

TRUST AND ESTATES
SURVEY OF 2004 CASE LAW

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Calculating Appreciation in Value of Beneficiary's Remainder Interest in Trust

In *In re Marriage of Balanson*,¹ the Colorado Court of Appeals considered how to calculate the appreciation in value of a wife's remainder interest in a trust at the time of dissolution of the marriage. In 1976, the wife's parents established a trust that was revocable until the death of one of them. When the wife's mother died in 1990, the trust became irrevocable and split into two trusts — Trust A and Trust B. Under the revocable trust instrument, the wife's father is entitled to mandatory payments of all income from both trusts during his lifetime and the trustee has discretion to invade the corpus for his support, care, and maintenance. The wife's father has a power of appointment over Trust A. In default of the exercise of the power of appointment, the trust corpus pours over into Trust B. Trust B provides for distribution to the wife and her brother on the father's death.

On appeal in 2001, the Colorado Supreme Court concluded that the wife's irrevocable remainder interest in Trust B constituted separate property, and that its appreciation in value during the marriage constituted marital property subject to division.² The Colorado Supreme Court ordered that, on remand, the trial court should calculate the trust's appreciation by determining the extent to which the trust's present value at the time of the decree exceeded its value at the time of creation.³

After the remand hearing in 2002 but before the trial court's ruling in 2003, the Colorado General Assembly enacted C.R.S. § 14-10-113(7)(b), which provides that the terms "property" and "an asset of a spouse" do not include any interest under a donative third-party instrument which is amendable and revocable. C.R.S. § 14-10-113(7)(b) applies to all cases filed on or after July 1, 2002, and to all cases filed before July 1, 2002, in which a final property disposition order

was not entered prior to July 1, 2002.⁴ The parties agreed that a final property disposition order, as defined in C.R.S. § 14-10-113(7)(c)(II), has not been entered in the case. When the trial court determined the value of the wife's trust interest, it did not consider this amended statute. The trial court looked at the appreciation in value of Trust B from 1976, when the wife's parents initially funded the revocable trust, until 1997, when the trial court entered the decree of dissolution. Based on the value determined, the trial court ordered the wife to make an equalization payment to the husband on her father's death.

The court of appeals reversed, agreeing with the wife that the trial court erred as a matter of law in failing to apply C.R.S. § 14-10-113(7)(b) when calculating the marital appreciation of her interest in Trust B. Under C.R.S. § 14-10-113(7)(b), the court of appeals concluded that the wife's interest in Trust B could not be classified as property until the revocable trust created by her parents became irrevocable in 1990 after her mother's death. According to the court of appeals, the supreme court's mandate on remand required the trial court to determine the appreciation in value of the wife's interest in Trust B by determining the extent to which the value of the trust at the time of the decree exceeded its value at the time when the wife acquired her property interest (*i.e.*, the date on which the revocable trust became irrevocable and split into Trust A and Trust B) as opposed to the date on which the wife's parents initially funded the revocable trust. In reversing the trial court, the court of appeals specifically rejected the husband's argument that the retroactive application of C.R.S. § 14-10-113(7)(b) is unconstitutionally retrospective.

Guardianship Proceedings — Punitive Contempt Sanctions

In *In the Matter of Lopez*,⁵ the Colorado Court of Appeals upheld a contempt order entered by the trial court against Victor Montoya and Lynn Smith but vacated an award of attorneys' fees.

Roger Lopez filed a petition in the trial court seeking to become the guardian and conservator of his father, Donald Lopez. Pursuant to C.R.S. § 15-14-305, the court registrar appointed a visitor to investigate and report on the need for a guardian or conservator. Both Ms. Smith, who was Donald Lopez's caseworker at the Adams County Department of Social Services, and Mr. Montoya, who was Ms. Smith's supervisor, were informed that the registrar had appointed a court visitor. With Mr. Montoya's knowledge, Ms. Smith removed Donald Lopez from an assisted living center, drove him to the airport, and left him in the care of a person who took him to California.

Following the issuance of contempt citations in January 2003 and an evidentiary hearing in February 2003, the trial court found Mr. Montoya and Ms. Smith in contempt of court and sentenced them to six months in jail. The trial court suspended the sentence on several conditions, including the payment of Roger Lopez's costs and attorneys' fees.

On appeal, the court of appeals rejected the arguments of Mr. Montoya and Ms. Smith that the trial court lacked jurisdiction to hold them in contempt because they were neither parties to the case or officers of the court nor subject to any direct court order. The court of appeals stated that the power to punish non-parties and non-officers who willfully interfere with judicial

proceedings derives from the court's inherent power to enforce obedience to its orders. In addition, the court of appeals noted that C.R.C.P 107(a)(1), the governing rule of civil procedure, does not limit the application of contempt to parties, officers of the court, or those subject to direct orders. Because the trial court had jurisdiction over the guardianship proceedings with which Mr. Montoya and Ms. Smith interfered, the court of appeals concluded that the trial had jurisdiction to punish them for contempt of court.

Even though the court of appeals concluded that the trial court had jurisdiction to punish Mr. Montoya and Ms. Smith for contempt, the court of appeals found that the trial court erred in ordering them to pay Roger Lopez's attorneys' fees. According to the court of appeals, the trial court imposed entirely punitive sanctions. Although attorneys' fees may be awarded in connection with remedial contempt sanctions, the court of appeals stated that attorneys' fees may not be imposed as part of a punitive contempt sanction.

Medicaid Recovery Program — Notice of Estate Claim

In *In re Estate of Kochevar*,⁶ the court of appeals reversed the trial court's grant of summary judgment in favor of the Estate of Molly E. Kochevar (the "Estate") regarding the Estate's denial of the claim filed by the Colorado Department of Health Care Policy and Financing ("CDHCPF"). Prior to her death in March 2001, the decedent received Medicaid benefits from the CDHCPF. In October 2001, the CDHCPF filed a claim in the probate court to recover the benefits paid on behalf of the decedent. The CDHCPF also sent a Notice of Estate Claim to the attorney representing the personal representative of the Estate. After the personal representative disallowed the claim filed in the probate court, the CDHCPF filed a petition for allowance.

Following the court of appeals' decision in *In re Estate of Schiola*,⁷ the CDHCPF sent the Estate a second Notice of Estate Claim, incorporating the additional information required under *Schiola*, in July 2002. In *Schiola*, the court of appeals held a Notice of Estate Claim to be defective in that it did not provide the required notice to individuals affected by the proposed recovery. Agreeing with the Estate that the October 2001 Notice of Estate Claim was defective for the reasons identified in *Schiola* and that the defects could not be cured by sending a corrected Notice of Estate Claim beyond the one-year period for presenting claims set forth in C.R.S. § 15-12-803, the probate court granted the Estate's motion for summary judgment, dismissing the claim.

Reversing the probate court's decision, the court of appeals agreed as an initial matter that the CDHCPF filed a timely claim pursuant to C.R.S. § 15-12-803(1)(a)(III), which provides that all claims against a decedent's estate arising before the death of the decedent are barred unless presented within one year after the decedent's death. In reaching this conclusion, the court of appeals relied on the Colorado Supreme Court's opinion in *In re Estate of Ongaro*.⁸ The Colorado Supreme Court in *Ongaro* held that, although a creditor need not strictly comply with all of the statutory requirements for presenting a claim set forth in C.R.S. § 15-12-804(1), the claim must include a request or demand for payment from the estate, and sufficient information to allow the personal representative to investigate and respond to the claim.⁹ According to the court of appeals, the claim filed by the CDHCPF within one year of the decedent's death

satisfied the *Ongaro* requirements because it stated the name and address of the CDHCPF, the amount claimed, and the basis of the claim.

When the CDHCPF seeks to assert a claim for reimbursement of medical assistance payments against an estate, federal law requires that the CDHCPF provide information in addition to the information set forth in C.R.S. § 15-12-804. As stated by the court of appeals in *Schiola*, the federal standard set forth in the State Medicaid Manual specifically requires that the Notice of Estate Claim must inform the personal representative that it is the heirs or other affected individuals who have a right to apply for a hardship waiver and direct the personal representative to give notice to the individuals.¹⁰ Although the CDHCPF sent the Estate a defective Notice of Estate Claim under *Schiola* in October 2001, the second Notice of Estate Claim sent to the Estate in July 2002 corrected the deficiencies. The court of appeals concluded that the defectiveness of the original Notice of Estate Claim did not affect the validity of the timely filed claim. In addition, the court of appeals concluded that the provision of a Notice of Estate Claim need not precede the filing of a claim in the probate court. Based on its determination that the notice given by the CDHCPF afforded the affected parties a full opportunity to be heard and reasonable time in which to apply for a hardship waiver, the court of appeals found that the CDHCPF did not violate the due process rights of the affected parties.

Claims Against Estate — Deadline for Filing Claims

The Colorado Court of Appeals affirmed the district court's dismissal of the claims filed by the personal representative against the estate of her father in *In re Estate of Sheridan*.¹¹

The decedent, Charlie D. Sheridan, died on November 5, 2001. As personal representative of the estate, M. Sue Jarrett placed a notice in a local newspaper informing creditors that they had until March 28, 2002, to present their claims. On November 1, 2002, Ms. Jarrett filed two claims as a creditor of the estate. Joyce Sheridan, an heir of the decedent, objected on the grounds that the claims were untimely. The district court dismissed Ms. Jarrett's claims.

The court of appeals first determined whether Ms. Jarrett must file her claim by the deadline contained in the published notice to creditors under C.R.S. § 15-12-803(a)(1)(I), or one year from the death of the decedent under C.R.S. § 15-12-803(1)(a)(III). The court of appeals concluded that, under the Colorado Probate Code, a known or reasonably ascertainable creditor must present his, her, or its claim by the published deadline if the creditor has actual knowledge of the deadline. In so concluding, the court of appeals noted that C.R.S. § 15-12-801(1), which sets forth the requirements for providing notice to creditors by publication, does not distinguish between known and unknown creditors. Additionally, the court of appeals observed that C.R.S. § 15-12-801(2) does not require a personal representative to send written notice to any creditor. Accordingly, the court of appeals stated that, even in the absence of written notice, the personal representative may still require unknown or unascertainable creditors and known and ascertainable creditors having actual knowledge of the published deadline to meet the published deadline. Based on the foregoing, the court of appeals concluded that the district court correctly determined that Ms. Jarrett, who possessed actual knowledge of the published deadline, was required to meet that deadline.

Next, the court of appeals considered whether Ms. Jarrett properly presented her claims before the published deadline. In concluding that Ms. Jarrett did not properly present her claims, the court of appeals first rejected Ms. Jarrett's argument that she did not need to satisfy the statutory requirements for presentation of claims because, as personal representative, she already had full knowledge of the claims. C.R.S. § 15-12-804, which sets forth the requirements for presentation of claims, applies to all claimants and all claims, without exception for claims that lie within the knowledge of the personal representative. Ms. Jarrett also argued that an agenda for a family meeting, a note written on a proposed settlement agreement, and audiotapes and videotapes constituted "a written statement of the claim" within the meaning of C.R.S. § 15-12-804. The court of appeals reviewed the Colorado Supreme Court's opinion in *In re Estate of Ongaro*,¹² in which the Colorado Supreme Court held that, although a creditor need not strictly comply with all of the statutory requirements for presenting a claim set forth in C.R.S. § 15-12-804(1), the claim must include a request or demand for payment from the estate, and sufficient information to allow the personal representative to investigate and respond to the claim.¹³ Applying *Ongaro*, the court of appeals concluded that the items identified by Ms. Jarrett did not constitute a written request or demand for payment from the estate or contain sufficient information to allow the personal representative to investigate and respond to the claims.

Medicaid — Retirement Plans — Resources of the Community Spouse

In *Houghton v. Reinertson*,¹⁴ Stepheny L. Stellers and R. Gene Sellers appealed the district court's grant of summary judgment in favor of the Colorado Department of Health Care Policy and Financing ("CDHCPF") with respect to its revised Medicaid eligibility rules regarding self-funded retirement accounts.

When one spouse is institutionalized (the "institutionalized spouse"), the Medicaid Catastrophic Care Act ("MCCA") sets forth a complex methodology for calculating the income and resources of the institutionalized spouse and the spouse remaining at home (the "community spouse") to determine the institutionalized spouse's Medicaid eligibility. In the fall of 2001, the CDHCPF revised the eligibility guidelines and changed the way that it classified self-funded retirement accounts. Prior to the revision, the CDHCPF did not classify self-funded retirement accounts held by the community spouse as "resources" available to support the institutionalized spouse. On September 1, 2001, however, the CDHCPF began including self-funded retirement accounts held by a community spouse as countable resources for the purpose of determining an institutionalized spouse's Medicaid eligibility. The CDHCPF applied the revised eligibility guidelines to initial applications for Medicaid benefits and to annual eligibility determinations.

On August 20, 1996, after admission to institutionalized care, Mrs. Sellers applied for Medicaid benefits. Pursuant to the guidelines in place at the time, the CDHCPF did not include Mr. Sellers' retirement funds as countable resources and approved Mrs. Sellers' application. On February 1, 2000, Mr. Sellers retired. During his employment, Mr. Sellers' employer funded a pension plan and a profit-sharing plan. Mr. Sellers also contributed to a 401(k) plan to which his employer provided matching contributions. When he retired, Mr. Sellers rolled his retirement portfolio into his IRA. On December 17, 2000, when Mr. Sellers turned 70½ years of age, Mr. Sellers received mandatory periodic payments from his IRA.

The CDHCPF did not include Mr. Sellers' retirement funds as resources in either 1999 or 2000 when reviewing Mrs. Sellers' Medicaid eligibility. In 2001, the CDHCPF notified Mr. Sellers that, based on the new rules requiring consideration of his retirement assets, Mrs. Sellers would no longer be eligible for Medicaid benefits.

On appeal, the Sellers argued that the MCCA does not permit the classification of retirement plans held by community spouse as resources available to an institutionalized spouse. After reviewing the MCCA, the remainder of the federal Medicaid Act, and Congress' purpose in enacting the MCCA, the Tenth Circuit concluded that the CDHCPF's new rule, which includes self-funded retirement accounts in the computation of a couple's resources, does not violate the MCCA.

The Sellers also argued that the CDHCPF violated the MCCA by classifying Mr. Sellers' IRA as a resource after the initial eligibility determination. The Tenth Circuit's review of the MCCA, the remainder of the federal Medicaid Act, and the relevant legislative history led it to conclude that, once an institutionalized spouse's eligibility is determined, the CDHCPF is not authorized to take any resources belonging to the community spouse and deem them available to the institutionalized spouse.

Accordingly, although the Tenth Circuit agreed with the district court that the MCCA permits the CDHCPF to classify self-funded retirement accounts as resources for purposes of determining an institutionalized spouse's Medicaid eligibility, the appellate court disagreed with the district court's conclusion regarding the reclassification of Mr. Sellers' IRA account following the initial eligibility determination and reversed the district court's entry of summary judgment in favor of the CDHCPF.

Colorado Dead Man's Statute

In *Estate of Crenshaw v. Bussey*¹⁵ the Colorado Court of Appeals construed the Colorado Dead Man's Statute for the first time in a published opinion since that statute was reenacted in 2002. The court of appeals held that a purported common law wife of a decedent cannot testify in her own favor regarding the validity of the marriage, which testimony could diminish the interests of the decedent's children from a prior marriage.

In this case the purported common law wife of an intestate decedent petitioned the trial court to be appointed as personal representative of the decedent's estate. Sons of the decedent from a prior marriage objected to the claim of marriage, and petitioned the trial court for the purported spouse's removal as a person without priority for appointment. At a trial on the issue of the validity of the common law marriage, the trial court permitted the purported spouse to testify regarding her relationship with the decedent and denied a motion *in limine* filed by the sons asserting that such testimony violated the dead man's statute. The trial court found a valid common law marriage existed between the purported spouse and the decedent. The sons appealed the trial court's decision on the basis that the court improperly allowed the purported spouse's testimony at trial.

The Colorado Dead Man's Statute, C.R.S. § 13-90-102(1), generally prevents a party from testifying regarding an oral statement made by the decedent. The trial court held that the purported spouse's testimony did not violate the Dead Man's Statute in this case because the testimony would not reduce the size of the estate, but rather would merely determine which persons would receive the decedent's estate. In addition, the trial court ruled that once the sons of the decedent presented testimony by other witnesses regarding the nonexistence of the marriage, the purported spouse was entitled to present her testimony as rebuttal evidence under an express statutory exception allowing testimony where an opposing party introduces evidence of related communications.¹⁶

The court of appeals reversed on two grounds. First, the appellate court concluded that the trial court incorrectly determined that the Dead Man's Statute only applies when the estate as a whole would be diminished. Rather, the Dead Man's Statute applies anytime a witness stands to share in the estate to the detriment of other heirs. Because the purported spouse in this case would be entitled to a marital share of the intestate estate, her status as a spouse would diminish the interests of the other heirs.

Secondly, the court of appeals concluded that the trial court erred by admitting the purported spouse's testimony as rebuttal evidence. The court of appeals determined that the trial court relied upon an exception appearing in a prior version of the dead man's statute¹⁷ that allowed rebuttal testimony, but which exception does not expressly appear in the new statute. Even if the new statute would permit rebuttal testimony under the exception allowing testimony where "an opposing party introduces evidence of related communications," the court of appeals determined that once the purported spouse was permitted to testify, the sons had no choice but to offer contradicting evidence as to the existence of the marriage. If the purported spouse had not been permitted to testify, the sons would not have been forced to present evidence of related conversations with the decedent.

The court of appeals supported its decision by noting that dead man's statutes are in derogation of the broad common law rule that disqualified interested parties from testifying in their own favor. As such, the Colorado Dead Man's Statute is to be strictly construed. Also influencing the court of appeal's decision was the principle that common law marriages are a fruitful source of perjury and fraud. Thus, when the purpose of a witness is to ultimately gain a share of the decedent's estate, that witness will not be permitted to testify in the witness's own behalf regarding an oral statement of the decedent, the validity of which would diminish the interest of some heirs. Judgment was vacated and the case was remanded for a new trial.

Validity of Will — Protected Person — Conservatorship

The court of appeals in *In re Estate of Gallavan*¹⁸ affirmed the trial court's determination that a will made by a person for whom a conservator had been appointed, is not invalidated merely because of such appointment. Further, the court of appeals held that where a personal representative's brief in a will contest action did not prejudice the rights of the will contestant, any error made by the trial court in failing to strike such brief is harmless.

The decedent was a protected person under conservatorship when she made her will. The terms of her will left her residuary estate in trust for her brother and sister for their lifetimes, and named Shriners Hospitals for Children as the remainder beneficiary. Both siblings of the decedent survived the decedent, but died shortly thereafter. The personal representative of the decedent's sister's estate (the "contestant") filed a petition for adjudication of intestacy, claiming that the decedent's will was invalid. Both the personal representative for the decedent's estate and Shriners Hospitals for Children filed briefs opposing the contestant's petition. The trial court denied the petition, concluding that the appointment of a conservator is not an adjudication of capacity, and applied both the Cunningham test¹⁹ and the insane delusion test²⁰ to find that the decedent had testamentary capacity at the time she made her will.

The court of appeals upheld the trial court's decision that the decedent's will was valid, addressing first the contestant's argument that the decedent lacked testamentary capacity and then addressing the impact of the personal representative's participation in this action.

The contestant argued that the appointment of a conservator establishes the protected person's incapacity because the conservatorship statute requires a finding that the protected person is unable to effectively receive or evaluate information. The court of appeals disagreed, reviewing both the conservatorship statute at the time the decedent made her will and the current conservatorship statute. Under both versions, the plain language of the statute provides that the appointment of a conservator does not require a finding of incapacity. Upholding the trial court's decision under these two statutes, the court of appeals did not address the contestant's further argument that the trial court misapplied the holding in *In re Estate of McCrone*.²¹

The court of appeals further disagreed with the contestant's claims that the trial court erred in finding that the decedent had testamentary capacity and that the trust is invalid because a protected person cannot execute a valid will that includes a trust. On the basis that findings of fact must be upheld unless clearly erroneous, the court of appeals determined that the trial court had appropriately applied the Cunningham test and the insane delusion test to find that the decedent had testamentary capacity. Next, the court of appeals concluded that although the appointment of a conservator prevents the protected person from making inter vivos transfers, such as to an inter vivos trust, the conservatorship is not implicated by testamentary transfers. Accordingly, the conservatorship statute does not prevent a protected person who has testamentary capacity from creating a testamentary trust.

Finally, the court of appeals addressed the contestant's argument that a personal representative is not an interested party, and thus cannot assist the proponent of a will in a will contest. Without considering the substance of this argument, the court of appeals concluded that because Shriners Hospitals for Children also filed a brief in this action, the contestant's substantial rights to invalidate the will were not prejudiced by the personal representative's brief. Accordingly, any error made by the trial court in considering the personal representative's brief was harmless.

Dissolution — Mandatory Distributions of Income — Property Right

Affirming the trial court, the Colorado Court of Appeals held in *In re Marriage of Guinn*,²² that a right to receive income from the property of a third party is not property subject to division in a dissolution action.

The parents of the husband in this dissolution action established an irrevocable trust which mandated that the trustee distribute all of the income to husband annually, and gave the trustee discretion to make distributions of the corpus to husband if reasonably necessary for his health, education, support, and maintenance. Upon husband's death, the corpus remains in trust for the benefit of husband's descendants. Husband's parents are the trustees of the trust and husband has no right to direct the investment of the trust corpus.

The trial court found, and neither party disputed the ruling, that husband had no property interest in the corpus of the trust. The trial court also found that husband has no property interest in the income of the trust over wife's argument that, because husband had an enforceable right to income from the trust, his income interest is property subject to division. Although husband had a right to mandatory distributions of income, the trial court reasoned that he could not require the trustee to invest the corpus with maximum income potential. Also persuasive to the court's decision was that neither party was able to cite a case holding that a beneficiary's interest in income from a trust is property.

The court of appeals upheld the trial court's decision, reasoning that the circumstances of this case are unique in that husband has neither a right to receive distributions from a trust in the sole discretion of the trustee, nor a vested remainder interest that would provide him with a right to future enjoyment of property. Rather, husband has a mandatory right to receive income that is subject to the discretion of the trustees to allocate earnings to principal and to direct the investments of the corpus. Further, in contrast to the situation where a beneficiary has a vested interest in the corpus or the remainder of a trust, husband's income interest derives from property vested in third parties instead of from property in which husband has a property interest. Under circumstances where the beneficiary has no interest in the corpus, and no right to control how the corpus is invested, the court of appeals concluded that the income derived therefrom is a mere gratuity. Accordingly, the court affirmed the decision of the trial court and held that even a mandatory right to unrealized future discretionary allocations of income is an expectancy arising from the generosity of the husband's parents and does not constitute property for the purposes of a dissolution action.

Wife petitioned the Colorado Supreme Court for certiorari in this matter, which petition was denied, although Justice Mullarkey would have granted certiorari as to the issue of whether husband had a property interest in the income of the trust.²³

Tangible Personal Property — Holographic Will

Construing a holographic will, the Colorado Court of Appeals in *In re Estate of Lewis*,²⁴ held that a gift of the "contents" of a residence does not include items such as stocks, coins, or jewelry unless the decedent's will clearly expresses a contrary intent.

The will of the decedent at issue in this case contained the following devise:

3060 So. Leyden & its entire contents are to go to Julie to be kept or disposed of as she sees fit. Special attention to be paid to the Silver, Crystal, Haviland China and antiques in the China Cabinet, tho [sic] many items are still missing at this time.

My jewelry & coins are temporarily at Norwest Bank at 1745 Broadway. I have been trying to locate Katherine Riedesel last known of in the San Francisco area and her brother Dr. William Riedesel last known to be in St. Louis. I intend to be more specific at a later date.

The decedent's will thereafter devised the remainder of her estate to various persons and entities, including several charities.

The personal representative for the decedent's estate petitioned the trial court for guidance regarding the distribution of stock certificates, jewelry and coins found in the decedent's home. The trial court concluded that such items were part of the residuary estate and the petitioner, the person who received the contents of the house, appealed that decision.

Reviewing the law of other jurisdictions, the court of appeals determined that the general rule is that, unless a contrary intention is clearly expressed in the will, a devise of a house and its contents does not include items such as stock certificates, bank accounts, checks, insurance policies, deeds, mortgages, securities, jewelry, and coins. Rather, "contents" generally refers to items of personal property typically used in and about the household, rather than those items that fortuitously happen to be in the house at the time of the decedent's death.

The court of appeals adopted this rule and applied it to the present case, reasoning that its application is consistent with the testatrix's intent as determined from her will. In particular, the decedent's examples of "contents" include those things which are commonly associated with the use and enjoyment of a house, such as silver, china, and crystal. The decedent specifically identified her jewelry and coins as items that were not included as "contents" of the house, but which were safely deposited in a bank. The significant number of residuary devisees also indicated to the court that the decedent intended for the large value of the stocks, jewelry, and coins (\$180,000) to be distributed among the devisees.

The petitioner also requested that the court of appeals award her attorneys' fees. As a general rule, a beneficiary may be awarded attorneys' fees where the action benefits the estate by preventing an unlawful distribution or where the beneficiary is responding to an action instigated by another. The court of appeals concluded that no award of attorneys' fees to the petitioner is appropriate in this action, reasoning that the petitioner filed her petition solely for her own benefit and not in response to an action by another. Accordingly, her petition was not a benefit to the estate and an award of attorneys' fees was unwarranted.

Erroneously Paid Medicaid Benefits

In this judicial review of an administrative action, the court of appeals held in *Nededog v. Colorado Dep't of Health Care Policy and Fin.*,²⁵ that the Colorado Department of Health Care Policy and Financing (“CDHCPF”) could collect Medicaid payments erroneously made to the plaintiff before the plaintiff was given adequate notice of termination of benefits. The court of appeals further held that no waiver applied to the plaintiff’s circumstances under the Medical Assistance Act, and waiver provisions included under the Colorado Public Assistance Act were inapplicable to recovery of Medicaid benefits.

The plaintiff in this matter received Supplemental Social Security Income (SSI) until October of 1998, which benefits made her eligible to receive Medicaid benefits. After termination of her SSI benefits, the plaintiff nonetheless continued to receive Medicaid benefits, through no fault of her own, until September of 2000 when she received notice of termination of such benefits. The Larimer County Department of Health Services (“County Department”) then sought recovery of the Medicaid benefits erroneously paid between September 1999 and September 2000.

Eligibility for Medicaid benefits continues until a person is determined to be ineligible.²⁶ Upon determination of ineligibility, notice must be mailed at least ten days before benefits are terminated.²⁷ The plaintiff in this case argued that, because she was eligible to receive Medicaid benefits until notice of termination, the County Department cannot recover benefits erroneously paid to her. The court of appeals, however, concluded that Colorado law requires recovery of Medicaid benefits paid to a person who was not lawfully entitled to such benefits and the ability to seek recovery is not impacted by the procedural requirements for notifying someone of termination of benefits. The court of appeals reasoned that the advance notice of termination requirements is consistent with due process rights inherent in receipt of public benefits. A claim to recover erroneously paid benefits does not raise the same perils to the recipient as does termination of benefits, and thus does not merit the same due process concerns.

The plaintiff further argued that, as an indigent person, she was entitled to a waiver from recovery of the erroneously paid benefits under the Colorado Public Assistance Act. That Act provides authority to waive recovery of overpayments of public “assistance payments” from a recipient who was without fault if the recovery would deprive the recipient of income required for ordinary living expenses.²⁸ However, the court of appeals concluded that Medicaid is expressly excluded from the definition of “assistance payments” under that Act, and thus waiver provisions under that Act are inapplicable to recovery of Medicaid benefits. The Medical Assistance Act, which governs the payment and recovery of Medicaid benefits, provides for waiver of recovery in limited circumstances, none of which are applicable in this case. The court of appeals thus held that CDHCPF properly rejected the plaintiff’s assertion that she was entitled to a waiver.

Disability Trusts

Reversing the judgment of the court of appeals, the Colorado Supreme Court held in *Stell v. Boulder County Dep't of Soc. Serv.*,²⁹ that, upon termination of a disability trust, a trustee may

use the corpus of the trust to pay state and federal taxes before the state is reimbursed for medical assistance rendered to the beneficiary.

The petitioner in this case is the beneficiary of a disability trust which was funded with the proceeds of a personal injury settlement. Its terms provided that upon petitioner's death, payments of the petitioner's funeral, burial, administrative, and tax expenses would be paid before funds from the trust would be available for Medicaid repayment. In addition, the trust required the Boulder County Department of Social Services (the "Department") to file a claim upon termination of the trust in order to receive repayment. The Department notified the petitioner that these terms did not meet the legal requirements of a disability trust, the assets of which would be exempt from consideration for the determination of eligibility for Medicaid benefits. That decision was ultimately affirmed by the district court and the Colorado Court of Appeals on the basis that the Department should have the highest priority for payment with respect to the remainder in a disability trust in order to compensate the State of Colorado for medical assistance payments.

The Colorado Supreme Court granted certiorari to review whether a trust will qualify as a disability trust for Medicaid eligibility purposes if federal and state taxes are given priority for payment upon termination of the trust.³⁰

Under both federal and state law requirements for disability trusts, the trust must include a provision that the state will be repaid all amounts remaining in the trust up to an amount equal to the total medical assistance paid by the state upon the death of the beneficiary.³¹ In addition, Colorado law requires that the terms of the trust provide that no person be entitled to payment from the remainder of the trust until the state medical assistance agency has been fully reimbursed.³² The supreme court concluded that the primary issue of construction in this case is whether the term "remainder" refers to a gross remainder or a net remainder, after deductions are made for payment of state and federal taxes.

Finding no instruction in either the state or federal statute regarding whether "remainder" was intended to refer to a gross or net remainder, the supreme court looked to Program Operations Manual System (POMS) guidelines (operating instructions used by the Social Security Administration), the Colorado State Medicaid Manual, the Uniform Probate Code, and public policy to decide the issue.

The POMS guidelines expressly permit the deduction of taxes and administrative expenses prior to reimbursing the state for medical assistance made to an individual, and the supreme court found the Colorado State Medicaid Manual not to be in conflict with those guidelines. Similarly, under the Colorado Uniform Probate Code, a trustee is directed to distribute income from a trust net of taxes and administrative expenses upon the death of a beneficiary or termination of a trust. Finally, the Court recognized that a trustee has prior obligations to pay taxes due on trust income, regardless of whether the state is fully reimbursed for the medical assistance rendered. It would be contrary to public policy to hold a trustee personally liable for the payment of such taxes if there are insufficient funds to pay both the taxes and the medical assistance reimbursement. Accordingly, the Court held that the term

“remainder” under the state disability trust statute means the net remainder, after all taxes due are paid.

Severance of Joint Tenancy — Deeds

In *Taylor v. Canterbury*,³³ an action involving the conveyance of real property by a joint tenant, the Colorado Supreme Court held that a joint tenant who unilaterally conveys his interest in real property back to himself, with the intent of creating a tenancy in common, effectively severs the joint tenancy as to that joint tenant and the remaining joint tenant or tenants.

In 1991, Terrell Taylor (“Taylor”) conveyed land to himself and Lucy Canterbury (“Canterbury”) as joint tenants. In 1997, Taylor executed a quitclaim deed purporting to transfer title back to himself and Canterbury as tenants in common. The deed expressly stated Taylor’s intention “to sever the joint tenancy created by [the 1991 deed], and to create a tenancy in common.” After Taylor’s death, Canterbury filed a quiet title action, claiming ownership of the property as a surviving joint tenant. The trial court found in favor of Canterbury, relying upon the Colorado Supreme Court’s decision in *Lee’s Estate v. Graber*,³⁴ which held that the gift of a joint interest in property was fixed and vested at the creation of the joint tenancy. The trial court thus concluded that the rights of the joint tenants were vested at the time of the 1991 deed. The Colorado Court of Appeals affirmed on a similar basis.

The Colorado Supreme Court granted certiorari to consider whether it is permissible for a joint owner of real estate to sever the joint tenancy by unilaterally conveying his interest in the property back to himself to create a tenancy in common with the other joint tenant.

Contrary to the common law, Colorado statutes no longer require the four unities of title (time, title, interest, and possession) in order to create a joint tenancy interest. Rather, joint tenancy is established in the instrument of conveyance by declaring that the property is conveyed in joint tenancy or as joint tenants.³⁵ In the present case, the supreme court expressly distinguished the holding in *Lee’s Estate*, which did not address whether the right of survivorship itself is fixed and vested at the creation of the joint interest. Indeed, the supreme court stated that years of precedent in Colorado provide that a joint tenant may unilaterally destroy the right of survivorship by severing the joint tenancy.

The supreme court then considered the means by which a joint tenant may sever a joint tenancy. At common law, a joint tenancy could be severed if the act destroyed one of the four unities. Often conveyance to a strawman was used in order to destroy the unities of time and title. In contrast to traditional common law, the modern tendency is not to require that the act of the co-tenant be destructive of one of the essential four unities of time, title, possession, or interest before a joint tenancy is terminated. Rather, the intent of the parties governs whether the joint tenancy has been severed. In light of this change, the supreme court concluded that conveyance to a strawman is no longer necessary in order to destroy a right of survivorship. Rather, the supreme court held that a joint tenant may sever a joint tenancy by conveying the property to himself as a tenant in common, without the need of an intermediary strawman.

Applying this rule to the case at hand, the supreme court concluded that the 1997 conveyance from Taylor to himself was effective to destroy the joint tenancy between him and Canterbury.

Justice Coats dissented, arguing that conveyance to a strawman is not a legal fiction, but rather carries with it some risk. Allowing conveyance of property to oneself abrogates a venerable principle of property law – that a joint tenant may not unilaterally destroy the tenancy without alienating his own interest. Justice Coats disagreed with the majority’s conclusion that the modern tendency is to look to the intent of a joint tenant to determine if the joint tenancy has been severed. Rather, to the extent that a new tendency has developed, Justice Coats believed it to be limited to termination of a joint tenancy with the consent of all joint tenants. Further, Justice Coats argued that although the legislature abrogated the common law rule to allow a grantor to create a joint tenancy by partially reconveying property to himself, such change did not extend the same principal to severing a joint tenancy.

Exemplary Damages — Breach of Fiduciary Duty Action

Affirming the decision of the Colorado Court of Appeals, the Colorado Supreme Court held in *Peterson v. McMahan*,³⁶ that a suit brought by a successor trustee against a former trustee to recover trust funds misappropriated by the former trustee can be maintained at law.

The defendant in this case, Ronald A. Peterson, had been the trustee of a supplemental care trust established for the benefit of Edward Sklar and funded with amounts recovered in a personal injury action. As trustee, Peterson made numerous unsecured loans from the trust to third parties at unreasonably low interest rates, several of which loans were not collected in accordance with their terms. Peterson also failed to file any accountings with the court, as he was required to do under the trust instrument. After Sklar’s death, in violation of the terms of the trust agreement, Peterson did not distribute trust assets to the named beneficiaries, but rather continued to make loans from the trust funds and administer the assets for approximately three years until the El Paso County District Court contacted Peterson to inquire about the trust administration. Peterson subsequently resigned as trustee and the court appointed Jane F. McMahan as the new trustee. McMahan promptly sued Peterson for breach of fiduciary duty and negligence.

The trial court found Peterson liable for gross negligence for failure to file annual accountings, for making improper loans, and for failing to invest trust assets in a prudent manner. The trial court awarded the plaintiff over \$300,000 in compensatory damages based on what the trust would have earned had the assets been invested in a prudent manner. The trial court also awarded exemplary damages of \$100,000 based on the court’s finding that Peterson acted willfully and wantonly, without regard to the rights and safety of others.

Peterson appealed the trial court’s decision arguing that the Colorado Supreme Court decision in *Kaitz v. Dist. Court*,³⁷ determined that breach of fiduciary duty actions are equitable rather than legal, and thus that exemplary damages were improperly awarded. The court of appeals nonetheless upheld the exemplary damage award, reasoning that holding in *Kaitz* did not foreclose the possibility that fiduciary duty claims could be tried at law.

In Colorado, exemplary damages may only be awarded in actions at law as opposed to actions in equity. There are two tests to determine whether an action is legal or equitable and the supreme court considered both. First, an action may be deemed “legal” if the remedy sought is monetary damages. Second, courts may look to the historical nature of the right that a plaintiff is seeking to enforce. In the present case, the plaintiff sought only monetary damages; however, because breach of fiduciary duty actions have a long history of being primarily equitable in nature, the court chose not to simply rely on the remedy test. Rather, the court looked to the Restatement (Second) Trusts and the decision in *Kaitz* to determine whether, in some instances, a breach of fiduciary duty action seeking monetary damages might be legal in nature.

In *Kaitz*, actions by a beneficiary against a trustee were determined to be “generally, but not always” equitable. The Restatement (Second) Trusts § 198 suggests that one instance in which a trust action may be maintained at law is where a trustee is under a duty to pay money immediately and unconditionally to the beneficiary. Comment (d) to that section states that this rule would apply where, for instance, a trustee is removed and a new trustee is appointed. The new trustee may maintain an action at law against the former trustee to recover misappropriated funds, since the former trustee is under a duty to pay the money immediately and unconditionally to the new trustee.

The supreme court concluded that the present action is precisely the situation contemplated by the Restatement. Peterson “misappropriated” trust funds by wrongfully or dishonestly loaning money, resulting in a loss to the trust. The new trustee, McMahon, brought this action against Peterson to recover the amount misappropriated. Accordingly, relying upon the Restatement and an analogous case from the Seventh Circuit, the Court held that an action of a successor trustee against a former trustee for misappropriation of trust funds is legal in nature and exemplary damages can properly be awarded. The supreme court was not persuaded by Peterson’s additional argument that the award of exemplary damages was improper because it required him to guarantee a twenty percent return on trust investments. Rather, the supreme court concluded that exemplary damages were awarded based on Peterson’s willful and wanton misconduct. The concept of a twenty percent return was introduced solely to determine a measure of compensatory damages.

Justice Coats dissented from the majority decision for two reasons. First, he believed the majority applied a mechanical distinction between suits brought by beneficiaries and suits brought by new trustees, whereas the Restatement section relied upon by the majority should apply whenever a trustee is required to pay money immediately and unconditionally. Second, Justice Coats concluded that the majority’s decision will result in punitive damage awards against trustees who fail to meet standards required of prudent investors, reasoning that the exemplary damages awarded against Peterson were not as a result of misappropriated trust funds, which only amounted to \$15,000, but rather because he failed to invest trust funds in a prudent manner.

Do Not Resuscitate Orders — Guardian

In *People ex. Rel. Morgan County Dep't of Human Serv. ex rel. Yeager*,³⁸ involving the ability of a guardian appointed by the court to execute a “do not resuscitate” (DNR) order, the Colorado Court of Appeals affirmed the decision of the trial court, holding (a) that counsel appointed for the incapacitated person has authority to file the appeal on the incapacitated person’s behalf, (b) that a government agency can be a “person” authorized to execute a DNR directive under the applicable statute, C.R.S. § 15-18.6-102, (c) that restrictions under the proxy decision maker statute (C.R.S. § 15-18.5-103(8)) preventing a governmental agency from becoming a proxy, are inapplicable to the DNR directive statute, (d) that no statutory presumption of consent to CPR applies in this matter, and (e) that the trial court did not abuse its discretion by allowing the incapacitated person’s physician to testify regarding the incapacitated person’s prognosis or the ethics of performing CPR at a hearing on the issuance of a DNR directive.

Morgan County Department of Human Services (“MCDHS”) was appointed guardian for Leo M. Yeager, an incapacitated person who had no known relatives, friends, or acquaintances. MCDHS filed a motion with the District Court for a DNR and the court appointed independent counsel for Yeager. At the hearing on the motion, Yeager’s counsel, MCDHS, and Yeager’s guardian ad litem (GAL) were present. Yeager’s physician (the only witness) gave testimony regarding Yeager’s medical condition and his reasons for supporting the DNR order. The trial court found, by clear and convincing evidence, that Yeager lacked sufficient understanding or capacity to communicate or make medical decisions and granted MCDHS authority to enter a DNR directive on Yeager’s behalf. Yeager’s counsel appealed the trial court’s order.³⁹

The court first addressed the issue of whether Yeager’s counsel had authority to appeal the trial court’s decision, given that his client could not communicate with him or give him direction. Under C.R.C.P. 17(c) a GAL has authority to sue on behalf of an incapacitated person if that person’s guardian does not so act. Accordingly, the court of appeals concluded that, because Yeager’s GAL supported this appeal, Yeager’s attorney had sufficient authority to pursue the appeal.

Next, the court addressed the substantive issue of whether MCDHS is a “person” with authority to execute a DNR order under the CPR directive statute, C.R.S. § 15-18.6-102. Such statute provides that an adult with decision-making capacity or “any other person” who is authorized to make medical decisions on behalf of an incapacitated adult can execute a DNR order. The court looked to the definition of “person” under the Colorado Probate Code, which includes an “organization.”⁴⁰ An “organization,” in turn, is defined in part as “a government or governmental subdivision or agency.”⁴¹ In addition, the court noted that under the guardianship statutes, a guardian is granted authority to make health decisions for a protected person. The court thus rejected Yeager’s attorney’s argument that the CPR directive statute applies only to natural persons and concluded that, as guardian, MCDHS has authority to execute a DNR order on Yeager’s behalf.

The court asked both parties to address whether the proxy decision-makers for medical treatment statute, C.R.S. § 15-18.5-103(8), should impact the court’s decision in this matter.

That statute specifically provides that a government agency cannot petition the court to act as an interested person for the purpose of becoming a proxy decision-maker. The court, however, concluded that this statute does not contain any language extending its prohibition to other parts of article 18, and consequently does not evidence intent by the General Assembly to prohibit all decision-making by governmental entities acting as guardian.

Yeager's attorney argued that the statutory presumption that a person is presumed to consent to CPR in absence of a DNR directive should apply in this case.⁴² However, the court determined that, because Yeager's guardian had authority to execute a DNR directive, a directive in fact existed and the presumption is inapplicable. The court also rejected Yeager's attorney's argument that the trial court erred by substituting its judgment for that of Yeager in absence of clear and convincing evidence of Yeager's wishes. The court determined that because the General Assembly specifically provided a statutory means for executing CPR directives for incapacitated persons, the court did not err in authorizing Yeager's guardian to make such a directive, especially in light of the fact that there was no evidence of Yeager's wishes.

Finally, the court addressed whether the trial court erred by allowing Yeager's physician to testify concerning Yeager's likelihood of surviving resuscitation and Yeager's prognosis for full recovery. Yeager's attorney argued that such evidence was irrelevant because it does not rebut the presumption that Yeager consented to CPR. The court, however, concluded that the presumption does not apply in these circumstances and that the evidence was relevant to the trial court's determination that the guardian would act in Yeager's best interests.

¹ *In re Marriage of Balanson*, Colo. App., Case No. 03CA0765 (Sept. 23, 2004).

² *In re Marriage of Balanson*, 25 P.3d 28 (Colo. 2001).

³ *See id.* at 42-43.

⁴ *See* C.R.S. § 14-10-113(7)(c).

⁵ *In the Matter of Lopez*, Colo. App., Case No. 03CA0824 (Oct. 7, 2004).

⁶ *In re Estate of Kochevar*, 94 P.3d 1253 (Colo. App. 2004).

⁷ *In re Estate of Schiola*, 51 P.3d 1080 (Colo. App. 2002).

⁸ *In re Estate of Ongaro*, 998 P.2d 1097 (Colo. 2000).

⁹ *See id.* at 1100.

¹⁰ *See Schiola*, 51 P.3d at 1083.

¹¹ *In re Estate of Sheridan*, Colo. App., Case No. 03CA0906 (Oct. 21, 2004).

¹² *In re Estate of Ongaro*, 998 P.2d 1097 (Colo. 2000).

¹³ *See id.* at 1100.

¹⁴ *Houghton v. Reinertson*, 382 F.2d 1162 (10th Cir. 2004).

¹⁵ *Estate of Crenshaw v. Bussey*, Colo. App., Case No. 03CA0218 (Aug. 26, 2004).

¹⁶ C.R.S. § 13-90-102(1)(c).

¹⁷ *See* Colo. Sess. Laws 1977, ch. 200, § 13-90-102(1.5) at 822 (allowing rebuttal testimony “[o]nce any witness has been permitted to testify concerning a conversation or transaction with a deceased person”).

¹⁸ *In re Estate of Gallavan*, 89 P.3d 521 (Colo. App. 2004).

¹⁹ A person has testamentary capacity under the Cunningham test when the will represent the person's wishes and that person (a) understands the nature of the act; (b) knows the extent of such person's property; (c) understands the proposed testamentary disposition; and (d) knows the natural objects of the person's bounty.

²⁰ Under the insane delusion test, a person lacks testamentary capacity when a person suffers from an insane delusion that materially affects the disposition in the will.

²¹ *In re Estate of McCrone*, 101 P.2d 25 (1940).

²² *In re Marriage of Guinn*, 93 P.3d 568 (Colo. App. 2004).

²³ *Guinn v. Guinn*, No. 04SC188 (Colo. July 19, 2004).

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- ²⁴ *In re Estate of Lewis*, 93 P.3d 605 (Colo. App. 2004).
- ²⁵ *Nededog v. Colorado Dep't of Health Care Policy and Fin.*, Colo. App., Case No. 03CA1005 (Aug. 12, 2004).
- ²⁶ See C.R.S. § 26-4-106(1)(a).
- ²⁷ See 42 C.F.R. § 431.211.
- ²⁸ See C.R.S. § 26-2-128(4).
- ²⁹ *Stell v. Boulder County Dep't of Soc. Serv.*, 92 P.3d 910 (Colo. 2004).
- ³⁰ Because of a change in federal law making recipients of Social Security Income (SSI) benefits automatically eligible for Medicaid benefits, the petitioner in this case was actually receiving Medicaid benefits at the time of this appeal, irrespective of the issues surrounding his disability trust. However, the Colorado Supreme Court granted certiorari nonetheless in this case, finding that it had subject matter jurisdiction because, as a disabled person, the petitioner will continue to need the protection of a trust. Reinstatement of petitioner's benefits does not resolve the question of priority of payments upon the ultimate termination of the trust.
- ³¹ See 42 U.S.C. § 1396p(d); C.R.S. § 15-14-412.8.
- ³² See C.R.S. § 15-14-412.8.
- ³³ *Taylor v. Canterbury*, 92 P.3d 961 (Colo. 2004).
- ³⁴ *Lee's Estate v. Graber*, 462 P.2d 492 (Colo. 1969).
- ³⁵ See C.R.S. § 38-31-101(1).
- ³⁶ *Peterson v. McMahon*, Colo. S. Ct., Case No. 03SC685 (Oct. 18, 2004).
- ³⁷ *Kaitz v. Dist. Court*, 650 P.2d 553 (Colo. 1982).
- ³⁸ *People ex. Rel. Morgan County Dep't of Human Serv. ex rel. Yeager*, 93 P.3d 589 (Colo. App. 2004).
- ³⁹ Although Yeager died before this appeal was decided, the Court of Appeals did not dismiss the case as moot, on the reasoning that the case is capable of repetition yet evading review.
- ⁴⁰ See C.R.S. § 15-10-201(38).
- ⁴¹ See C.R.S. § 15-10-201(35).
- ⁴² See C.R.S. § 15-18.6-104(3).