NOTICE OF MEETING FOR THE PROBATE TRIAL AND PROCEDURE COMMITTEE OF THE TRUST AND ESTATE SECTION AND ELDER LAW SECTION OF THE COLORADO BAR ASSOCIATION

October 6, 2021 at 10 a.m.

https://cba-cle.zoom.us/j/85270187336?pwd=RVVxMjUxOTBTY2s2aVBMUHdPNlBzZz09

Meeting ID: 852 7018 7336
Passcode: 583631

Call-in: 1 346 248 7799
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Find your local number: https://cba-cle.zoom.us/u/kbXeCzxaz

AGENDA

1. Welcome and Introductions
2. Review of Minutes from September 1, 2021 - Approval
3. Chair's Report - Marcie McMinimee and Lindsay Andrew
    a. *Estate of Gallegos*
    b. Holiday Party
4. New Business or Requests
5. Updates/Reports
    a. CRPP Rule 40(d). Submitted to Supreme Court for approval. Effective date.
    b. Probate Bench Book – Kathy Seidel
    c. C.R.S. §§15-14-708(2) and 421(6)(a) Powers of Attorney when fiduciary appointed. Marcie McMinimee and Lindsay Andrew
    d. Virtual Court Proceedings – Norv Brasch
    e. Conservator's Annual Report – Marcie McMinimee
    f. Abandoned Wills Subcommittee
6. Adjournment

NEXT MEETING: November 3, 2021 @ 10 a.m.

REMINDER: Join the Committee through CBA Membership Department – email membership@cobar.org

SUMMARY
August 26, 2021

2021COA115

No. 20CA0721, *Estate of Gallegos* — Probate — Intestate Succession — Individual Adopted by Relative of Genetic Parent

As a matter of first impression, a division of the court of appeals concludes that intestate succession for a child who was adopted by certain relatives of the child's genetic parents is governed by Probate Code section 15-11-119(3), C.R.S. 2020, rather than a conflicting provision of the Children's Code, section 19-3-608, C.R.S. 2020, which terminates an adopted child's status as an heir at law upon a final decree of adoption.

COLORADO COURT OF APPEALS **2021COA115**

Court of Appeals No. 20CA0721
Costilla County District Court No. 17PR30006
Honorable Crista Newmyer-Olsen, Judge

In re the Estate of Joseph Celestino Gallegos, deceased.

Shennae Finan, f/k/a Shennae Jaramillo and Corpus A. Gallegos Ranches, LLLP, a Colorado limited liability limited partnership,

Appellants,

v.

Patricia Vialpando,

Appellee.

JUDGMENT AFFIRMED

Division V
Opinion by JUDGE GROVE
J. Jones and Graham*, JJ., concur

Announced August 26, 2021

Dill Dill Carr Stonbraker & Hutchings, P.C., David R. Struthers, Denver, Colorado, for Appellant Shennae Finan

The Overton Law Firm, Thomas J. Overton, Steven R. Schumacher, Golden, Colorado, for Appellant Corpus A. Gallegos Ranches, LLLP

Law Office of Karl Kuenhold LLC, Karl Kuenhold, Denver, Colorado, for Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

¶ 1 In this probate case, appellants Shennae Finan, formerly known as Shennae Jaramillo, and Corpus A. Gallegos Ranches, LLLP, appeal the district court's ruling that appellee Patricia Vialpando is an heir of Joseph Celestino Gallegos, who died intestate. Applying section 15-11-119(3), C.R.S. 2020, we conclude that, for the purpose of intestate succession, the parent-child relationship between Gallegos and Vialpando was not terminated when Vialpando was adopted in 1991. Therefore, we affirm.

I. Background

¶ 2 Gallegos died in December 2016. He had two biological children: Vialpando and Finan. Vialpando was born in 1990 and was adopted by her maternal grandparents in 1991. However, she maintained a relationship with Gallegos throughout his life and he named her as the beneficiary of his savings and retirement accounts. Finan, who was born in 1989 and who otherwise had no relationship with Gallegos, learned that Gallegos was her father nearly two years after his death. Both biological daughters now seek a share of his estate, and Finan's heirship is not in dispute.

¶ 3 Gallegos died without a spouse or a will, meaning that his children are entitled to inherit the estate's assets in equal shares.

See § 15-11-103(2), C.R.S. 2020. The district court named Vialpando his sole heir and appointed her as personal representative for his estate. Once Finan learned that Gallegos was her biological father, however, she moved to modify the court's determination of heirship. Finan's motion claimed that she was Gallegos's sole heir because Vialpando's adoption cut off Vialpando's relationship with Gallegos for the purpose of intestate succession. Gallegos Ranches, a family partnership owned by the late Gallegos and his two brothers, joined Finan's argument.

¶ 4 The district court ruled that both Vialpando and Finan are heirs to Gallegos's estate. Although Vialpando was adopted by her maternal grandparents — thereby terminating her parent-child relationship with Gallegos — the court concluded that a 2010 amendment to the Probate Code, which allowed children adopted by relatives to inherit from their genetic parents, revived that relationship for the purpose of intestate succession. Finan and Gallegos Ranches now jointly appeal, contending that the district court erred by applying the amended Probate Code provision because it was passed nearly twenty years after Vialpando's adoption was finalized.

II. Standard of Review

¶ 5 Statutory interpretation is a question of law that we review de novo. *See, e.g.*, *Neher v. Neher*, 2015 COA 103, ¶ 19. We first examine the statute's plain language within the context of the statute as a whole. *Id.* We give words and phrases effect based on their plain and ordinary meaning. *Id.* If a statute is clear and unambiguous on its face, we apply it and do not resort to other canons of statutory interpretation. *Hassler v. Acct. Brokers of Larimer Cnty., Inc.*, 2012 CO 24, ¶ 15.

¶ 6 In probate cases, we must construe the statutory provisions "liberally to promote a speedy and efficient system for settling a decedent's estate, and making distribution to his or her successors, while promoting uniformity in the administration of estates among different jurisdictions." *Oldham v. Pedrie*, 2015 COA 95, ¶ 10.

III. Children's Code

¶ 7 Under the Children's Code, a final decree of adoption divests the biological parents "of all legal rights and obligations with respect to the child." § 19-5-211(2), C.R.S. 2020. Relatedly, a "child's status as an heir at law . . . shall cease only upon a final decree of adoption." § 19-3-608(1), C.R.S. 2020. Under these provisions, as

things stood in 1991, once Vialpando was adopted (by anyone), any right to inherit property via Colorado's laws of intestate succession was terminated along with the parent-child relationship.

IV. Probate Code

¶ 8 In 2010, the General Assembly amended Colorado's intestate succession laws. As relevant here, those amendments included a provision allowing children who are adopted by relatives of either genetic parent to inherit from a genetic parent who dies without a will.

> A parent-child relationship exists between both genetic parents and an individual who is adopted by a relative of a genetic parent, or by the spouse or surviving spouse of a relative of a genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through either genetic parent.

§ 15-11-119(3). This language was in effect in 2016 at the time of Gallegos's death.

V. Analysis

¶ 9 The sole question before us is whether the 2010 amendment applies to Vialpando. We hold that it does and as a result conclude that Vialpando is Gallegos's heir.

¶ 10 Appellants contend that upon Vialpando's adoption in 1991, Gallegos was permanently divested of "all legal rights and obligations with respect to" Vialpando, and the parent-child relationship was forever terminated. Because of the finality of the adoption decree and the corresponding provisions of the Children's Code, which specify that "a child's status as an heir at law" ceases upon a final decree of adoption, § 19-3-608(1), appellants assert that the 2010 amendment to the Probate Code had no effect on Vialpando's status as an heir.[1] Because no parent-child relationship existed in 2010, appellants contend, there was no parent-child relationship to revive, even for the limited purpose of intestate succession. We disagree.

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[1] Notably, appellants do not distinguish between an heir and an heir apparent. It is settled law that heirs can only be determined after a decedent's death. Prior to his death, a decedent's relative can only be an heir apparent — someone with a mere expectation of inheriting in the future. *See Quintrall v. Goldsmith*, 134 Colo. 410, 418, 306 P.2d 246, 250 (1957). It is upon the decedent's death that the legal title to estate property vests instantly in his heirs at law. *In re Estate of McQuade*, 88 Colo. 341, 346, 296 P. 1023, 1025 (1931); *see also Pierce v. Francis*, 194 P.3d 505, 510 (Colo. App. 2008).

A. Conflict of Laws

¶ 11 Probate courts must consider the adoption and inheritance laws in effect at the time of adoption, but the right of adopted children to inherit is determined by the inheritance laws in effect when the intestate died. *Estate of David v. Snelson*, 776 P.2d 813, 820, 815 (Colo. 1989). The Probate Code in effect at the time of Gallegos's death provided that a parent-child relationship existed between "both genetic parents and an individual who is adopted by a relative of a genetic parent . . . *but only* for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from . . . either genetic parent." § 15-11-119(3) (emphasis added). The statute does not clarify whether it is intended to have only prospective effect, but because Vialpando was adopted by her maternal grandparents, it applies unless the adoption irreversibly severed the parent-child relationship between Vialpando and Gallegos for all purposes.

¶ 12 Nothing in Vialpando's adoption records addressed the effect of the adoption on Vialpando's status as Gallegos's heir. However, under the Children's Code, Vialpando's "status as an heir at law" ceased "upon a final decree of adoption." § 19-3-608(1). This

provision conflicts with the 2010 amendment to the Probate Code. Simply put, if section 15-11-119(3) controls, Vialpando became Gallegos's heir upon his death. On the other hand, if adoption irrevocably severed Vialpando's relationship with Gallegos for all purposes, then she did not. To resolve this conflict, we apply principles of statutory construction to determine which provision controls.

B. Principles of Statutory Construction

¶ 13 The overriding goal of statutory construction is to effectuate the legislature's intent. *Doubleday v. People*, 2016 CO 3, ¶ 19. We interpret the statute within the context of its broader scheme to give consistent, harmonious, and sensible effect to all its parts. *Curtis v. Hyland Hills Park & Recreation Dist.*, 179 P.3d 81, 83 (Colo. App. 2007). When we conclude, as we do here, that two applicable provisions are irreconcilable, we look to both specificity and recency to resolve the conflict. *Dawson v. Reider*, 872 P.2d 212, 214 (Colo. 1994).

¶ 14 First, the more specific statute prevails over the more general one. § 2-4-205, C.R.S. 2020 (explaining that if a conflict between a special provision and a general provision is irreconcilable, "the

special . . . provision prevails as an exception to the general provision"). "Interpreting a specific provision as prevailing over a general one still allows for both provisions to exist," *People v. Cooper*, 27 P.3d 348, 355 (Colo. 2001), an approach that is consistent with the goal of giving full and sensible effect to the entire statutory scheme, *see Smith v. Colo. Motor Vehicle Dealer Bd.*, 200 P.3d 1115, 1118 (Colo. App. 2008).

¶ 15 Second, the more recent statute prevails over the older one. *Jenkins v. Panama Canal Ry. Co.*, 208 P.3d 238, 241 (Colo. 2009). This is true even if the General Assembly did not clearly intend the more recent statute to supplant an existing statute. *See City of Florence v. Pepper*, 145 P.3d 654, 657, 660 (Colo. 2006). We assume the legislature is aware of its enactments, and, therefore, we conclude that by passing an irreconcilable statute at a later date, it "intended to alter the prior statute." *Jenkins*, 208 P.3d at 242.

¶ 16 Applying these principles here, we conclude that because the probate statute is both more specific and more recent, it prevails over the conflicting provisions of the Children's Code.

¶ 17 At the outset, we recognize that the conflict between section 15-11-119(3) and section 19-3-608(1) is quite limited. It only applies to children who have been adopted by certain relatives of their biological parents; section 19-3-608(1) continues to apply to nonrelative adoptions. Because we aim to give full and sensible effect to the entire statutory scheme, we interpret section 15-11-119(3) as carving out a limited exception to the general rule outlined in section 19-3-608(1).

¶ 18 The timing of section 15-11-119(3)'s passage lends support to our conclusion that the General Assembly intended to alter the scope of section 19-3-608. To be sure, we assume that the legislature is familiar with its previous enactments. *Jenkins*, 208 P.3d at 242. But it is also clear that the amendment to the Probate Code would not make sense unless the General Assembly understood the general rule established in the Children's Code. Therefore, we are confident that the legislature "intended to alter" the Children's Code when it passed the more recent amendment to the Probate Code. *See id.*

¶ 19 But this does not end our inquiry. Having concluded that the 2010 amendments to the Probate Code govern our review of

Gallegos's intestate succession, we next evaluate our application of the statute to ensure that it does not run afoul of the state constitution.

C. Retroactivity and Retrospectivity

¶ 20 Appellants contend that designating Vialpando as Gallegos's heir under section 15-11-119(3) is an impermissible retroactive and retrospective application of that provision, contrary to legislative intent and in violation of the Colorado Constitution. As they point out, the General Assembly has specifically provided that "[n]o provision of this [probate] code or of any amendment to this code shall apply retroactively if the court determines that such application would cause the provisions to be retrospective in its operation in violation of section 11 of article II of the state constitution." § 15-17-101(2)(f), C.R.S. 2020.

¶ 21 A statute is retroactive if it operates on transactions that have already occurred or on rights and obligations that existed before its effective date. *Ficarra v. Dep't of Regul. Agencies*, 849 P.2d 6, 11 (Colo. 1993). Retroactive application of a statute is generally disfavored by both the common law and statute. *Id.*; § 2-4-202, C.R.S. 2020. But retroactive application of a civil statute is not

necessarily unconstitutional: it is permitted where the statute effects a change that is procedural or remedial. *People v. D.K.B.*, 843 P.2d 1326, 1332 (Colo. 1993). Because some retroactively applied legislation is constitutional while some is not, Colorado courts mark this distinction with the term contained in the constitutional provision — "retrospective" — to describe a statute whose retroactive application is unconstitutional. *In re Estate of DeWitt*, 54 P.3d 849, 854 (Colo. 2002); *Ficarra*, 849 P.2d at 12.

¶ 22 Contrary to appellants' claims, the district court did not apply section 15-11-119(3) either retroactively or retrospectively. Because no child has a vested right in her father's property before his death, *Quintrall v. Goldsmith*, 134 Colo. 410, 419, 306 P.2d 246, 250-51 (1957), Vialpando could not have permanently lost any right to Gallegos's estate when she was adopted in 1991. As we have already discussed, a decedent's heirs are determined at the moment of his death, based on the Probate Code in effect at the time of his death.

¶ 23 When Gallegos died in 2016, the court appropriately applied the *existing* Probate Code, which provides that a "parent-child relationship exists" for purposes of intestate succession between

Gallegos and Vialpando. § 15-11-119(3). Had Gallegos died between the date of Vialpando's adoption and the day prior to the enactment of the 2010 Probate Code amendment, Vialpando would not be considered an heir. But that is not what happened. Gallegos died after the 2010 Probate Code amendment was enacted, so Vialpando appropriately inherits her share of his estate through intestate succession. This means that applying the 2010 amendment to the Probate Code to the intestate succession of Gallegos's estate is not retroactive.

D. Vested Rights

¶ 24 We find the foregoing statutory analysis dispositive of the issue of Vialpando's heirship. However, we now briefly address appellants' alternative argument that upon Vialpando's adoption in 1991, Gallegos had a vested right to be free from any future legal obligations that would result from being her biological father, even after his death. We find this unpersuasive.

¶ 25 Appellants contend that the focus should properly be on Gallegos's vested rights to be free of any obligations to Vialpando, and not on Vialpando's legal right to inherit. But "heirship is not a parental obligation; it is a legal right which accrues automatically to

the child upon the decedent's death." *In re Estate of Bomareto*, 757 P.2d 1135, 1137 (Colo. App. 1988) (citing *Quintrall*, 134 Colo. 410, 306 P.2d 246), *overruled on other grounds by Estate of David*, 776 P.2d at 820. In their briefing, appellants did not cite any cases supporting their contention that Gallegos's right to be free of parental obligations also applied to intestate succession by his heirs, nor could they point us to any such cases during oral argument.

¶ 26 Instead, appellants cite the statutory language of the 2010 Probate Code amendment in support of their contention that Gallegos's vested right is not affected by the revision to the statute. Section 15-17-101(2)(d) of the Probate Code reads: "An act done . . . before the effective date of an amendment to this code, in any proceeding is not impaired by this code or by any amendment to this code." But appellants' argument fails because the adoption of Vialpando was not impaired or otherwise affected by the 2010 amendment to the Probate Code. Throughout his life, Gallegos remained free of any legal rights or obligations with respect to Vialpando.

¶ 27 If, as appellants contend, adoption means that a biological parent has a vested right to have no legal connection to the child at any point in the future, and this vested right supersedes statutory changes, then this would render the General Assembly's 2010 amendment to the Probate Code meaningless regardless of the date of the adoption. Because a "statutory interpretation leading to an illogical or absurd result will not be followed," *Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004), we decline to adopt this interpretation.

VI. Conclusion

¶ 28 The judgment is affirmed.

JUDGE J. JONES and JUDGE GRAHAM concur.

Probate Trial and Procedure Committee

Minutes of the September 1, 2021 Meeting

The Probate Trial and Procedure Committee met virtually and in-person at the Colorado Bar Association on September 1, 2021. The meeting was called to order at approximately 10:00 am.

The following members were present or participated by phone:

Lindsay Andrew – Landrew@schwartzattorneys.com
Marcie McMinimee – mmcminimee@schwartzattorneys.com
Norv Brasch – norv@tealaw.com
Gary Clexton – gclexton@m-s-lawyers.com
Sal Quintana – s.quintana@qlegalservices.com
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Tom Rodriguez – tom@elderlawcolorado.com
Susie Germany – susie@coelderlaw.net
Marco Chayet – marco@elderlawcolorado.com
Tammy Conover – tammy@conoverlawllc.com
Andrea Dixon
Shauna Clemmer
Nathan Klotz
Brian Reynolds
Andrew Rogers

1 Approval of Minutes of Prior Meeting

The minutes of the August 4, 2021 meeting were approved.

2 Chair's Report

a. Discussion around the proposed changes to C.R.S. §15-602 and §15-12-705. The committee has no concerns with the proposed statutory changes related to disclosure of fiduciary fees. As the proposed changes will impact the JDF Form – Information

of Appointment; the Supreme Court Probate Rules Committee will need to be aware of the change so the committee can update the form accordingly. Lindsay Andrew or Marcie McMinimee will update SRC.

b. Follow up discussion surrounding the May 6, 2021 Colorado Court of Appeals Opinion, *In re the Estate of Everhart*, 2021 COA63, which concludes that application of Rule 12(b)(5) to petitions filed under C.R.S. §15-12-403(1) does not contravene the plain language of the relevant statutory provision, is contemplated by the rules of probate procedure, and advances the purpose of the probate code.

   Further discussion was held on cases where the Everhart decision has been successfully argued to dismiss an action; and a recent Arapahoe County case where Everhart was argued related to fiduciary oversite. Once an order is issued related to the fiduciary oversite case, Spencer Crona will update the committee.

   The Committee agreed a sub-committee is not necessary on this issue.

c. For the remainder of 2021, our meetings will be held virtually.

d. Due to the uncertainty of COVID protocols, we will take a "wait and see" approach to the Holiday Party, and we revisit the topic next month.

3 New Business or Requests

a. The Abandoned Wills Committee (CEPAEPDA) met and discussed the 2023 effective date for the State Court Administrator's Office to create a platform for scanning original Wills and digital storage. Herb Tucker shared that his office staff completed an informal survey that reflected that a handful of District Courts do no permit the lodging of original Wills. Instead, the Courts make a digital copy and return the original to the petitioner, applicant or attorney requesting lodging. The survey also reflects a handful of Colorado District Courts in uncontested cases will allow the lodging of the original Will but then return the original Will by mail to the party who lodged it after a period of time. The Abandoned Wills Committee discussed the creation of a subcommittee to look into the local rules of Colorado District Courts regarding the lodging or original wills. Marcie McMinimee will contact the Supreme Court Probate Rules Committee to determine whether they want to take any action related to this issue.

b. Tim Bounds reported there is an opening for a Public Administrator in Adams County, 17th Judicial District; and he will forward the details from Magistrate Sara Price regarding applications.

4 Updates/Reports

a. CRPP Rule 40(d). Marcie McMinimee reported that the Supreme Court Rules and Forms committee approved the Rule. She will update the committee next month on the effective date of the Rule, and thereafter, we will remove this item from the agenda.

b. Cost Recovery and Compensation Act. No report and tabled for now.

c. DHS/APS "substantiated perpetrator" list. Tabled.

d. C.R.S. §§ 15-14-708(2) and 15-14-421(6)(a) re Powers of Attorney. There will be no omnibus probate bill this year. Lindsay Andrew will work with Andy White to determine whether the proposed changes can be run as a stand-alone issue.

e. Virtual Court Proceedings. We opened discussions back up on this issue, as courts have different protocols related to in-person and WEBEX hearings, and whether virtual witnesses will be allowed moving forward. With the upswing in COVID cases, the committee also wants to keep an eye on its impact to the Courts this fall. Keith Lapuyade raised the issue of *access to justice* for those who cannot afford to attend court in person, or have health issues preventing them from doing so.

f. Conservator's Annual Report –Marcie McMinimee will follow up with Connie Lind at the Supreme Court as to how the Supreme Court would like to proceed with the proposed changes to the Report.

g. Probate Bench Book – no update.

5 Adjournment

The meeting adjourned at approximately 10:50 am.