

COLORADO CASE LAW UPDATE (MAY 2008-AUGUST 2009)

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I. SUPREME COURT DECISIONS.

Krueger v. Ary, 205 P.3d 1150, 2009 WL 662071 (Colo. 2009)

Jury Instructions—Undue Influence Presumption

The Colorado Supreme Court upheld trial court's refusal to instruct jury on the presumption of undue influence with regard to transfers to a fiduciary. The decedent's daughter, as personal representative ("PR"), sued the decedent's Caretaker in an attempt to invalidate certain lifetime gifts made by decedent to his caretaker in his final years.

At trial, the PR successfully raised the presumption, shifting the burden of going forward to the Caretaker. The Caretaker presented evidence regarding Decedent's independent intent, and the court determined that she rebutted the presumption. After presentation of evidence, the PR tendered jury instructions regarding the undue influence presumption but the court rejected the instruction; the jury delivered a verdict in favor of Caretaker. PR appealed. The Supreme Court upheld the trial judge, overruling its earlier decisions in *Hilliard v. Shallabarger*, 120 Colo. 441 (1949) and *Arnold v. Abernethy*, 134 Colo. 573 (1957).

The undue influence presumption shifts the burden of going forward to the party against whom it is raised. Failure to meet the burden results in the establishment of the presumed facts as a matter of law. If the burden is met, the presumption does not continue, but a permissible inference of the presumed facts remains. As stated by the Court, "though the presumed facts may not be established as a matter of law, the jury may nevertheless *infer* the presumed facts from the evidence that gave rise to the presumptions" (*Hilliard* and *Arnold* did not distinguish between the burden of proof and the burden of going forward and were thus overruled). The Court further held that the trial judge has broad discretion over jury instructions' form and style, that instructions emphasizing specific evidence are disfavored, and that the trial court did not abuse its discretion in refusing the instruction.

Schwartz v. Schwartz, 183 P.3d 552 (Colo. 2008)

Declaratory Judgment—Appeals—Marital Agreements—Elective Share

In the course of dissolution of marriage proceedings, wife brought a declaratory judgment action to determine the validity of an antenuptial agreement. The agreement waived all property rights on behalf of both spouses, and waived each spouse's interest in the other's estate unless otherwise provided in a subsequent will. The trial court held that the agreement was invalid due to wife's bad faith. Wife appealed, but died while the appeal was pending. The Court of Appeals dismissed the appeal as moot. Both parties disagreed with the dismissal, as did the Colorado Supreme Court on certiorari review. The Colorado Supreme Court held that while the wife's death rendered the dissolution of marriage proceedings moot, the declaratory judgment action relating to the validity of the antenuptial agreement remained relevant, because its resolution would affect the existing controversy created by the husband's efforts to gain from the wife's estate through an elective share proceeding. The Court noted that the wife's declaratory judgment action was not dependent upon the dissolution proceedings and could have been brought independently.

Brief by Michelle R. Mieras

II. COURT OF APPEALS DECISIONS.

Fischbach v. Holzberlein, ___ P.3d ___, 2009 WL 1622782 (Colo. App. 2009).

As of August 27, 2009, this opinion had not been released for publication in the permanent law reports. A petition for rehearing in the Court of Appeals or a petition for Certiorari in the Supreme Court may be pending.

Beneficiary Deeds—Transfers Involving Trusts—Reformation—Statutory Interpretation

Grantor made a Trust naming herself as sole lifetime beneficiary and sole trustee. Upon her death, the Trust named her children, Richard, Timothy, Carol, and Robert, as equal beneficiaries and named her son, Richard, as successor trustee. Subsequently, Grantor conveyed the "Boulder Street Property" and the "Spencer Road Property" to the Trust. Two years later, in her capacity as trustee, Grantor made two beneficiary deeds, which purported to transfer, on her death, the Boulder Street Property to Richard and the Spencer Road Property to Timothy. Grantor subsequently died.

Richard, acting as successor trustee, quitclaimed the Boulder Street Property to himself and the Spencer Road Property to Timothy. Carol and Robert sued alleging that the beneficiary deeds were void as a matter of law. They otherwise sought to quiet title to the properties in the Trust, and they further alleged certain breaches of fiduciary duty against Richard. Richard and Timothy counterclaimed for reformation of the beneficiary deeds. Their counterclaim did not include a request to reform the trust.

During the litigation, Carol and Robert filed a motion for partial summary judgment asserting, among other things, that the Trust was not an “owner” or “grantor” as defined by the statute governing beneficiary deeds, Section 15-15-401, C.R.S. The trial court granted summary judgment in favor of Carol and Robert, thus voiding the beneficiary deeds. The Court of Appeals affirmed.

Premised on principles of statutory interpretation, the Court ruled that the language and broader context of Section 401 requires that a beneficiary deed must be made by a natural person and cannot be made by a trustee, a trust, or other artificial entity. The Court further followed a Missouri case holding that a beneficiary deed that is invalid as a matter of law may not be remedied by reformation. Making reference to the Restatement (Third) of Property: Wills & Other Donative Transfers § 12.1, the Court explained that “Reformation is also unavailable to correct an invalid donative instrument made after execution of a trust or will.” Notably, the Court declined to reform the Trust under equitable principles based on the Grantor’s intent because the issue, which was argued on appeal, was not presented to the trial court.

In re: Estate of Whittman, ___ P.3d ___, 2009 WL 707410 (Colo. App. 2009)

As of May 12, 2009, this opinion had not been released for publication in the permanent law reports. A petition for rehearing in the Court of Appeals or a petition for Certiorari in the Supreme Court may be pending.

Exempt Property and Family Allowance Claims—Joint Tenancy—Creditor Claims

Plaintiff sued Defendant on certain contractual breaches in connection with his farming operation. Before the action was tried, Defendant died. The court substituted his wife as a party in her capacity as personal representative (“PR”), but ten months later, still prior to trial, she died.

Plaintiff timely filed a claim in Defendant’s estate based on the pending civil suit and in Wife’s estate alleging that any liability established by the civil suit would become the joint obligation of both estates. The personal representative of Wife’s estate, made exempt property and family allowance claims against Defendant’s estate. *See* Sections 15-11-403 and 404, C.R.S.

In the consolidated matter, the trial judge determined [1] Defendant breached the contracts in question; [2] Wife was not liable on the contract claims, but the proceeds from the sale of certain farm equipment and a gun collection sold by Wife after Defendant’s death properly belonged in Dean’s estate and were thus available to pay the judgment; [3] the family allowance claim was allowed, but the exempt property claim was disallowed; so [4] a constructive trust in the amount of the judgment was imposed on Wife’s estate and the claim for the judgment amount against her estate were thus allowed.

Wife’s PR appealed. The Court of Appeals affirmed in part and reversed in part, and remanded the matter to the trial court for further proceedings.

Property owned by husband and wife are presumed to be held in joint tenancy. Section 15-11-805(1), C.R.S. An exception exists for trade or business property provided that the surviving spouse had no interest in the going concern. *Id.* The presumption may likewise be overcome if a preponderance of evidence shows the property was not jointly held. *Id.* at ¶ (2). The Court agreed that Wife had no joint interest in the farm equipment, but it determined that insufficient evidence existed on record to overcome the presumption with respect to the gun collection.

The Court also reversed the trial court's disallowance of the exempt property claim, holding that the claim arises on the death of the first spouse but that the subsequent death of a surviving spouse does not extinguish the claim. Section 15-11-403, C.R.S.

Bates v. Henneberry, ___ P.3d ___, 2009 WL 1152186 (Colo. App. 2009)

As of May 12, 2009, this opinion had not been released for publication in the permanent law reports. A petition for rehearing in the Court of Appeals or a petition for Certiorari in the Supreme Court may be pending.

Medicaid Eligibility—Limitations Rules for Judicial Review of Final Agency Decision—Section 1983 Claims Under the Medicaid Act

Applicant created and funded a trust under which the trustee had discretion to make unsecured loans to any person, including the applicant. Applicant later applied for Medicaid benefits, but the Colorado Department of Healthcare Policy and Financing (the "Department") denied her application. Under the Department's interpretation of the Medicaid Act, the trust's assets were resources available to the Applicant-grantor.

The Office of Administrative Appeals issued a Final Agency Decision on September 7, 2007, requiring Applicant to bring an action for review in district court within 30 days. Section 24-4-106(4), C.R.S. Before doing so, applicant submitted a motion for reconsideration to the Office. On November 13, 2007, Applicant brought an action against the Department (naming its executive staff) in district court for review of the decision, both on its merits and under 42 U.S.C. § 1983. Section 1983 creates a cause of action when a person is deprived of a Constitutional or federal statutory rights by a person acting under color of state law. Section 1983 requires that the claimant assert a violation of a federal right, not merely a violation of a federal law.

The district court dismissed the action, and the Court of Appeals affirmed, ruling that Sections 1396p(d)(3)(B) and 1396a(a)(17) of the Medicaid Act do not confer an actionable right under Section 1983. The court also dismissed the matter on the basis that Applicant exceeded the 30-day period under 24-4-106(4), so her action was time-barred. The Applicant's argued that her motion for reconsideration before the Office tolled the deadline, but the Court reasoned that since she did not explicitly request a postponement of the effective date pursuant to Section 24-4-105(16)(b), C.R.S., her action was nevertheless time-barred.

In re: the Estate of Reed, 201 P.3d 1264 (Colo. App. 2008)

Settlement of Personal Injuries in Probate—Medical Liens

Child was treated for injuries he received in an automobile accident, including treatment from Psychologist for post traumatic stress disorder. Psychologist's bill comprised the largest portion of Child's accident-related medical expenses. In connection with Psychologist's services, Mother signed an instrument purporting to create a lien against the proceeds of any personal injury claim.

Meanwhile, a negligence action was commenced by Child "by and through ... his mother and legal guardian." Mother was not named as party in her individual capacity. The driver's insurer defended the matter and agreed to settle the claim "inclusive of outstanding medical bills." The attorney who commenced the lawsuit filed a "Petition to Settle Personal Injury Claim" pursuant to Section 15-14-412, C.R.S. and C.R.P.P 16. The Petition requested that the settlement proceeds be placed in a structured annuity for the benefit of Child; it did not provide for payment to Psychologist.

Prior to a hearing on the matter, Mother received a discharge in Bankruptcy resulting in the cancelation of her debt to Psychologist. Unable to collect from Mother, Psychologist objected to the Petition, asserting that he had an enforceable lien against the settlement proceeds. The probate court found that Mother could not create a lien against her son's estate and approved the settlement without payment to Psychologist. Psychologist appealed.

The Court of Appeals agreed that a parent cannot create an enforceable lien against the estate of a dependant child. However, it further held that while Mother was primarily liable for the medical expenses of a minor child, Psychologist may be entitled to recover against Child's estate under the theories of promissory estoppel, quantum meruit, the necessities doctrine, and other equitable principles. Thus, the Court vacated the trial court's ruling remanded the matter, instructing the court to determine whether Mother was willing and able to pay the Psychologist and, if not, whether equitable principles and the factors set forth in Section 15-14-411(3), C.R.S. require that he be paid from Child's settlement estate.

In re: M.J.K., 200 P.3d 1106 (Colo. App. 2008)

Guardianship—Best Interests Standard—Scope of Judicial Authority in Protective Proceedings—Due Process

In 2003, Grandmother and Mother co-petitioned for the appointment of Grandmother as guardian for Mother's four children. The guardianships were awarded and Grandmother took custody of the children. The guardianships were unlimited in both scope and duration. Over the next two years, Grandmother permitted Mother varying amounts of supervised parenting time

In 2005, Mother filed motions requesting the return of primary residential care and decision-making authority. The probate court made note of Mother's progress in addressing her

substance abuse problems, but it refused Mother's motions under the *best interests* standards set forth in Section 15-14-210, C.R.S. and Section 14-10-129 and 131, C.R.S.

Mother appealed arguing [1] that she did not receive the required notice of the 2003 guardianship proceedings and [2] that the *best interests* standard impinged on the due process right of a natural parent to custody of her children. *Troxel v. Granville*, 530 U.S. 47 (2000) (plurality opinion).

The Court of Appeals affirmed the probate court's decision. On the first issue, the Court held that by participating in the guardianship petitions, Mother waived a right to challenge the proceeding on grounds of insufficient notice. On the second issue, the Court held that *Troxel* applies in the context of a court's review of the "day to day child rearing decisions of fit, custodial parents," but not the present situation where the parent has already relinquished her right to custody. Consequently, the *best interests* standard employed by the probate court did not infringe on Mother's due process rights.

Moffett v. Life Care Centers of America, Inc., 187 P.3d 1140, 07CA0376
(Colo. App. 2008) (certiorari granted)

***Agent Authority Under General Durable and Healthcare Powers of Attorney—
Arbitration Agreements***

Prior to entering a nursing facility, an Alzheimer's patient's son signed an arbitration agreement on behalf of the patient as Agent under both a general durable and durable healthcare powers of attorney. The Agent retained a copy of the signed arbitration agreement. The patient later died, and the patient's family brought a wrongful death action against the nursing facility in Denver District Court. The facility moved for an order compelling arbitration.

The Colorado Health Care Availability Act sets forth certain requirements pertaining to arbitration agreements between patients and care facilities. Section 13-64-403(11), C.R.S. provides, "No such [arbitration] agreement may be submitted to a patient for approval when the patient's condition prevents the patient from making a rational decision whether or not to execute an agreement." Section 403(6) provides that the patient "shall be provided a written copy of any agreement subject to the provisions of this section at the time it is signed by the parties." Section 403(7) provides, "No healthcare provider shall refuse to provide medical care services to any patient solely because such patient refused to sign such an [arbitration] agreement."

The district court denied the facility's motion compelling arbitration, concluding that the signature of the patient's attorney in fact was insufficient to comply with Section 403(11), that the patient was not provided (and because of the patient's incapacity, could not validly receive) a written copy of the arbitration agreement as required by Section 403(6), and that the attorney in fact was told that admission to the facility was conditioned on signing the arbitration agreement in violation of Section 403(7).

Citing Sections 15-1-1313(1)(e) and 14-506(3), C.R.S., the Court of Appeals reversed, stating that an attorney in fact under either a general durable or a durable healthcare power of attorney may compliantly execute an arbitration agreement in accordance with Section 13-64-403(11),

C.R.S. The Court further held that the facility may satisfy the delivery requirements of Section 403(6) by presenting the signed arbitration agreement to the attorney in fact. Lastly, the Court remanded the matter for a determination in regards to whether the facility conditioned admission to the facility on the execution of the arbitration agreement.

In re Estate of Murphy, 195 P.3d 1147 (Colo. App. 2008)

Probate Court Jurisdiction—Non Appearance Hearings

Murphy conveyed real property to herself and to Moore as joint tenants. Murphy then purportedly executed a second deed conveying the property to herself and to a third party, who in turn executed a third deed conveying the property back to Murphy. Murphy died in 2005, and the personal representative (“PR”) of her estate attempted to sell the property, claiming it was the sole property of Murphy’s estate.

Moore filed a complaint for partition in the Denver District Court. The district court dismissed the complaint on the basis that the Denver Probate Court had exclusive jurisdiction over such proceedings. Moore then filed a petition in the Denver Probate Court. The PR moved to dismiss on the basis of claim preclusion and set the motion to dismiss for a non-appearance hearing pursuant to C.R.P.P. 8.8. Moore filed a timely objection but failed to timely set the objection for an appearance hearing as required by the Rule. The probate court struck the motion to dismiss from the non-appearance docket on the basis that the motion was neither “routine” nor “expected to be unopposed” as required by Rule 8.8(a). Before reaching a decision on the merits, however, the probate court dismissed the petition for lack of subject matter jurisdiction.

The Court of Appeals reversed. Murphy had an interest in the property, either as the sole owner, a joint tenant, or a tenant in common. Thus, the Court held that the determination of that interest was “logically related” to Murphy’s estate and therefore within the Denver Probate Court’s grant of authority as set forth in Section 13-9-103(3)(a), C.R.S. The Court further held that the probate court had jurisdiction to resolve the controversy as it concerned the “distribution of the estates of decedents” pursuant to Section 13-9-103(1)(a), C.R.S.

The Court rejected the PR’s argument that Moore’s failure to comply with Rule 8.8 required the probate court to grant the motion to dismiss. Noting the record of opposition to the PR’s motion, the Court ruled that Rule 8.8 does not apply to such “dispositive motions,” which must be decided on their merits. The Court further held that the probate court “retains discretion to deny [non-appearance motions] for any legitimate reason,” despite an objecting party’s failure to comply with Rule 8.8(a)(4). Lastly, the Court rejected the PR’s argument that the probate proceeding was barred under the theory of claim preclusion.

Pierce v. Francis, 194 P.3d 505 (Colo. App. 2008)

Will Contest—Lis pendens—Spurious Lien—Appeal

In this case of first impression the Colorado Court of Appeals validated the filing of a notice of *lis pendens* against property where title to the property might ultimately be affected by the outcome of a will contest.

Decedent's daughter contested the validity of the decedent's two wills, the older of which left everything to the decedent's spouse (or, if he failed to survive, to their grandchildren), and the newer of which left everything to the decedent's attorney. While the matter was pending in the probate court, the daughter filed a notice of *lis pendens* against the estate's primary asset, the decedent's residence. The probate court denied probate of the newer will based on the decedent's lack of capacity and the presence of undue influence, but admitted the older will to probate. The decedent's daughter appealed, and filed a second notice of *lis pendens*. The estate petitioned, in a district court, to remove the notices of *lis pendens* under the spurious lien statute. The trial court concluded that the notices were spurious because the ownership of the property was not at issue in the underlying will contest, and the daughter's likelihood of success on appeal was too speculative to support a claim affecting title. The personal representative appealed.

After determining that a notice of *lis pendens* can be a spurious document governed by the spurious lien statute and dispensing with the daughter's argument that a trial court other than the probate court lacked jurisdiction over the removal petition, the Court of Appeals reversed the trial court's determination that the notices of *lis pendens* were spurious. The Court of Appeals determined that because the will contest could ultimately affect an interest in the property, the notice of *lis pendens* filed during the pendency of the will contest was not spurious. With regard to the notice of *lis pendens* filed during the appeal, the Court of Appeals concluded that the daughter had a continuing claim to an interest in the property during the appeal, making the second notice of *lis pendens* not spurious, regardless of the lack of any evidence that the daughter would succeed on appeal.

Brief by Michelle R. Mieras

III. DISCIPLINARY ACTIONS.

People v. Pettigrew, Not Reported in P.3d, 2009 WL 426080 (Colo. O.P.D.J. 2009)

Attorney's Conduct Whilst Serving as Personal Representative

Attorney was suspended from the practice of law for a period of one year and one day for recklessly failing to preserve funds belonging to a decedent's estate for which she was personal representative.