

**00PR244(4/25/00)**

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PROBATE COURT CITY AND COUNTY OF DENVER STATE OF COLORADO

Case No. 00PR244

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IN THE MATTER OF

The Estate of MABLE M. BRADEN aka MABLE BRADEN  
Deceased.

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FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDERS

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THIS MATTER comes before the Court upon three related matters.

Margaret L. Stegink (hereinafter "Petitioner") filed a Petition for Formal Probate of Will and Formal Appointment of Co-Personal Representatives. Petitioner is a surviving daughter of the decedent, Mable Braden. Petitioner and her husband, Keith Stegink, filed a Motion for Court Interpretation of Will.

Another daughter, Regina Bravo, (hereinafter "Respondent"), subsequently filed a Motion to Dismiss, arguing lack of jurisdiction in this Court. The Court combined the Petition, the Motion for Court Interpretation, and the Motion to Dismiss for an evidentiary hearing on March 15, 2000. Petitioner was present and represented by counsel Kevin F. Hughes, Esq. Respondent was also present and represented by George Aucoin, Esq.

Notice was not given to a possible residuary devisee of the purported will. Accordingly, the Court proceeded with the hearing as a convenience to all of the parties assembled, some of whom had traveled across state lines; however, the Court deferred ruling until proper notice was given to the Red Cross. The Court heard arguments and evidence on the motion to dismiss as well as the Petition for Probate and the Motion for Court Interpretation.

The Court has reviewed the file, read counsel's pleadings, considered the evidence presented, heard the arguments of counsel, and studied the applicable law. The issues relating to the Motion to Dismiss and the merits of the Petition are intertwined. Accordingly, the Court makes the following findings of fact to assist in the analysis.

It is not disputed that Mable Braden lived in the City and County of Denver until approximately August 28, 1999. At that time, she decided to live with her two daughters, Regina and Margaret, six months in each home. Regina's home is in Utah; Margaret's home is in Colorado.

Sometime in 1998 Mable Braden was going on a trip and she decided to give her daughter Margaret a power of attorney to assist with her financial affairs in her absence and in the event that "anything happened to her." In addition, she signed a Quit Claim Deed conveying title to her residence to herself and Margaret, again to assist in her absence and "in the event that anything happened to her."

It is clear to the Court that Margaret's authority was as an agent, not a donee. She was not the owner of any of Mable's property, including the real estate, but was holding title merely as an agent, subject to Mable's ownership. Margaret's testimony supports this finding and she has not alleged that a gift was made to her of the 50% interest.

Margaret testified that she did not utilize the power of attorney or record the deed because it was unnecessary to do so and "nothing happened to Mable" on the trip.

After Mable returned unscathed from her trip, instead of destroying the Quit Claim Deed or returning it to Mable, Margaret—acting without new direction from Mable—recorded the Quit Claim Deed; hence, placing herself in title as to a one-half interest. Margaret testified that there were no new directions from Mable regarding the deed but that she acted because she believed that Mable was losing her capacity to act for herself. Contrariwise, Margaret testified that she did not realize, until later, when an attorney advising Mable pointed it out to them that, by recording the deed, she had effected a transfer of a 50% interest in Mable's home to herself.

#### ANALYSIS OF APPLICABLE LAW

Colorado courts have held that when one party holds a position of superiority over another, or when a "confidential relationship" exists between two parties, a transfer of property obtained as a result of an abuse of this relationship may be set aside. *Ralston Oil and Gas Company v. July Corporation*, 719 P.2d 334 (Colo. App. 1985). *Page v. Clark*, 592 P.2d 792, 798 (Colo. 1979) (citing *United Fire v. Nissan Motor*, 433 P.2d 769 (1967)). Alternatively, the Court may remedy the abuse of the confidential relationship by imposing a constructive trust. *Ralston*, *supra*.

In the instant case, the decedent executed the deed to Margaret solely to accommodate travel and potential disability. The recording of the deed took place under Margaret's power of attorney, which was a confidential relationship, and was apparently unknown to Mable. In any event, because the execution of the Quit Claim Deed was not intended to serve as a gift or sale of the property from Mable to Margaret when it was signed by Mable, and because there is not a scintilla of evidence that Mable's intent in this regard changed, Margaret's subsequent act of recording the deed and making the transfer to her absolute and donative, constituted an abuse of discretion. Therefore, the transfer of the one-half interest of the decedent's property to Margaret is rescinded and the property remains part of Mable's estate. Alternatively, the Court imposes a constructive trust for the benefit of the estate of Mable Braden on the 50% interest purportedly owned by Petitioner.

The Motion to Dismiss filed by Regina Bravo argues that this Court lacks jurisdiction over the estate of Mable Braden because Mable Braden did not own property in the City and County of Denver. The Court has concluded that the estate of Mable Braden is the proper owner of the one-half interest in Mable's home that was deeded to Margaret Stegnick. The estate therefore is the owner of real property within the jurisdiction of this Court. On this basis, the Motion to Dismiss is Denied.

Domicile of Mable Braden

Alternatively, Regina Bravo argues that this Court lacks jurisdiction over the estate of Mable Braden because Mable Braden did not die a resident of the City and County. Although the Court has found that Mable Braden did own property in the City and County of Denver and that jurisdiction for this proceeding is proper, the Court will nevertheless address this alternative argument.

As a general rule, the primary probate of a will should be made in the place of the testator's domicile. 95 C.J.S. Wills § 352 at 199-200. Domicile requires residence as well as an intention to make such residence one's permanent home. *Lyons v. Egan*, 132 P.2d 794, 798 (Colo. 1942). The mere fact that a decedent may have died in a certain location does not give the court jurisdiction to admit the decedent's will to probate. *In re Estate of Vilm*, 299 P.2d 513, 514 (Colo. 1956).

Under the common law, "residence" and "domicile" are not synonymous terms. *Carlson v. District Court*, 180 P.2d 525, 529-30 (Colo. 1947); *Lyons*, 132 P.2d at 798. See also *Cline v. Knight*, 127 P.2d 680 (Colo. 1943). Generally, residence denotes a place where a person dwells and "simply requires bodily presence as an inhabitant in a given place." *Potter v. State Farm Mutual Automobile Insurance Co.*, 2000 WL 124402 at \* 2 (Colo. App. 2000) (unpublished opinion) (quoting *Carlson*, 180 P.2d at 530). Domicile, in contrast, is not only where a person lives, but where that person intends to make a fixed and permanent home. *Lyons*, 132 P.2d at 798. See also *Koscove v. Koscove*, 156 P.2d 696, 699 (Colo. 1945). An individual may have more than one residence but generally has only one domicile.

Once an individual has acquired a domicile, that individual must abandon it before acquiring another. *Lyons*, 132 P.2d at 798. The individual must both have the intent to acquire the new domicile and also reside within that domicile. *Id.* Although an individual's statement may be indicative of intent to establish a new domicile, "they are of slight weight when they conflict with fact." *Id.* (quoting *State of Texas v. State of Florida*, 306 U.S. 398, 59 S. Ct. 563, 576, 830, 83 L.Ed. 817). Conduct carries a greater evidential value than of declarations. "The inference of intention from actual residence grows stronger the longer the residence is continued; and where residence last for many years, the inference of intention to make the place a home is almost controlling." *Id.* (quoting 1 *Beal Confl. Of Law*, 255).

Problems occur in determining domicile when an individual has more than one residence. Some courts have held that the important facts in determining the domicile of a person who has two residences include: the physical character of each residence, time spent and things done in each place, and whether or not there is an intention to return to the original domicile. C.J.S. Domicile §39 (citing *White v. Manchin*, 318 S.E. 2d 470, 173 W.Va. 526). Where a person has two residences, the law presumes that the earlier domicile remains as such until a clear intention to change is established. C.J.S., Domicile § 39 at 62.

Although Respondent testified at the hearing that Mable Braden made statements indicating she wanted to remain in Salt Lake, these statements were insufficient to overcome the evidence of her domicile in Colorado. Mable Braden lived in Colorado for nearly 40 years. She owned a home within the state of Colorado. She was receiving benefits through the Denver Department of Human Services that extended until the end of the month in which she died.

The only documentary evidence or testimony that Mable Braden intended to change her domicile came from Respondent whose testimony was self serving and uncorroborated. The consistent and credible evidence established to the Court's satisfaction that Mable Braden was a long-term resident and domiciliary of Colorado who spent portions of the last few months of her life in Utah and died in the state of Utah. Considering all of the evidence the Court does not conclude that a clear intention to change domicile has been established.

Based upon the foregoing law and analysis, the Denver Probate Court has jurisdiction over this matter because Mable Braden was a domiciliary of Denver, Colorado

#### Probate of Purported Will

The second matter before the Court is the Petition for Formal Probate. Petitioners offer for probate a document signed by Mable Braden dated 4-7-99.

The first issue addressed by the Court is whether or not the document was even intended by Mable Braden to be a testamentary instrument. In *Matter of Estate of Olschansky*, 735 P.2d 927, 929 (Colo. App. 1987) the Colorado Court of Appeals set forth the following test of "testamentary intent":

. . . The writing, together with such extrinsic evidence as may be admissible, must establish that the decedent intended the writing itself to make a testamentary disposition of decedent's property.

No particular language is required to indicate testamentary intent. The Court must find that the language expresses (a) an intended disposition of property; and (b) which takes effect at death. See *Mallory v. Mallory*, 862 S.W.2d 879, 881 (Ky. 1993); *Ayala v. Martinez*, 883 S.W.2d 270, 272 (Tex. App. 1995).

Here, the document uses predominantly precatory language: ". . . do here by wish to sell my house . . ." . It refers to Mable Braden's use of the money received from a sale of her home during her lifetime: "the money coming in from the sale of the house is mine, . . . to save, spend, squander, or give away as I choose to do." These are not testamentary words of disposition which take effect at death. Furthermore the document is not referred to as a will; in fact, it has no title or caption of any kind. It has characteristics of contract, correspondence, deed, and devise. Overall, it is not clearly testamentary in character. The Court finds that Petitioner has not proven that this document expresses (a) an intended disposition of property, that (b) takes effect at death. See *Mallory* and *Ayala* supra.

Assuming that the Court had instead concluded that the document was intended to be testamentary in effect, the Court must still consider whether the document itself can be admitted to probate under the Colorado Probate Code. There are three separate analyses applied by the Court.

First, if it were intended to be a testamentary disposition, does this particular document meet the requirements of a holographic will under C.R.S. § 15-11-502(2) so that it can be admitted to probate as the decedent's will? It cannot as it is not in the handwriting of the decedent. C.R.S. § 15-11-502(2)

Second, even if the Court had concluded that the document was intended as a testamentary instrument, the Court cannot admit the document to probate as a properly executed will under C.R.S. § 15-11-502(1). Assuming, for the benefit of Petitioner, that the notary public who signed the will was a witness, the document nevertheless fails the test of testamentary formalities within the meaning of C.R.S. § 15-11-502(1)(c).

Finally, the Colorado Probate Code allows a non-holographic will not executed in compliance with the statutory formalities to be admitted to probate if the proponent of such will establishes by clear and convincing evidence that the decedent intended the will to constitute the decedent's will. C.R.S. §15-11-503 (1999) The Colorado legislature added C.R.S. § 15-11-

503 to the Colorado Probate Code in 1994 to allow courts, under limited circumstances, to validate wills flawed by harmless errors in execution.

Petitioner has failed to establish that this document has sufficient testamentary characteristics even to be considered a will. Therefore, it is inherently defective under C.R.S. § 15-11-503 which requires clear and convincing evidence that the will was intended as decedent's will. The Court has, nevertheless, given additional consideration to the application of C.R.S. § 15-11-503 to the document offered, assuming for purposes of this analysis that the document had met the threshold test of testamentary character.

Formalities of will execution ceremonies serve several functions. First they provide the court with reliable evidence of the decedent's intention to give the terms of a will legal effect. Probating Flawed Wills: Colorado's New C.R.S § 15-11-503, 25 Colo. 85 (Nov. 1996). Second, they perform a "ritual function" since fulfillment of the necessary acts demonstrate premeditation and deliberation of the decedent and the finality of the decedent's intention. *Id.* Third, formalities serve a "protective function" since they safeguard against fraud, duress, undue influence, and establish the genuineness of specific disposition of property intended by the testator. *Id.*

In admitting an improperly executed will to probate under C.R.S. §15-11-503, the Court is called upon to apply the clear and convincing standard of proof. Clear and convincing is somewhere between "preponderance" and "beyond a reasonable doubt", see Colorado Jury Instructions, 3:2 at 74 (4th Civil, 1998) and is said to require that the Court find the fact to "be highly probable" and one about which the Court has "no serious or substantial doubt." *Id.*

In requiring that the Court apply the higher standard of proof in admitting a will that has not been executed with testamentary formalities, the legislature expects the Court to substitute other proof for the role normally played by the formalities of execution. See this Court's opinions in Case No. 96PR2115, *In the Matter of the Estate of John Keith Tempel, a/k/a Keith Tempel, J. Keith Tempel John K. Tempel, Deceased*, opinion dated April 17, 1997 and 97PR1578, *In the Matter of the Estate of Larry E. Rother, Deceased*, opinion dated December 9, 1997.

In *Rother*, this Court found that the legislature did not intend to eliminate the requirement that the testator's signature be witnessed. This Court concluded in that case, as it does here, that where there are none of the customary formalities—and hence solemnity—associated with the execution of the document to alert the testatrix that the document she is signing has legal effect and that it will control the disposition of her property as of the moment of her death, it is particularly important that there be some independent acknowledgement of the level of the testatrix's awareness by persons who did not participate in the drafting of the document and do not benefit, directly or indirectly from its terms.

The evidence establishes that Mable Braden did not have the benefit of independent legal advice in connection with the preparation of this document. According to the testimony of Petitioner, Petitioner's husband drafted the document. Petitioner then took Mable Braden to the office of the notary. At some point in time Mable signed the document. The person referred to in the document who would benefit from a bargain sale of Mable Braden's home is a child of Petitioner and her husband. Their participation in the drafting and signing of the document and the benefit potentially derived therefrom by their daughter heightens rather than relaxes the Court's scrutiny into whether the testatrix clearly and convincingly intended this document to express her testamentary desires.

No evidence was presented explaining why the decedent could not comply with the Probate Code's statutory requirements for dual execution. There was no evidence that the decedent found herself in such extenuating circumstances that only one witness could sign the will, nor was there evidence that the decedent was unaware of the requirement that in order to be valid, a will must be signed by at least two attesting witness.

Petitioners failed to demonstrate through clear and convincing evidence that the decedent intended the purported document dated April 7, 1999 to constitute her Last Will and Testament. The lack of witnesses is not a harmless or technical defect allowing the Court to conclude that the document should be probated under C.R.S. § 15-11-503. This Court, therefore, declines to admit the document to probate.

The Court DENIES Petitioners' Petition for Formal Probate of Will.

Because of the Court's ruling denying probate to the document, the Motion for Court Interpretation of Will is MOOT.

April 25, 2000

C. Jean Stewart  
Judge, Probate Court

C.R.S. § 38-31-101 deals with the creation of joint tenancies in real estate. There is a presumption against the creation of a joint tenancy in real property unless the instrument transferring the property or evidence of ownership states that the property is transferred or held in joint tenancy. C.R.S. §§ 38-31-101 and 38-11-101 (1999). Note, this is different from multiple-party accounts described under C.R.S. § 15-15-201 et seq, which presumes that multiple-party accounts are joint tenancy accounts with a right to survivorship unless a contrary intent is shown by the account documents. See C.R.S. §§ 15-15-201(5) and 15-15-212(3).

Here, the decedent's property at 830 S. Yates was conveyed to Regina Bravo by the decedent pursuant to a Quit Claim deed recorded with the Denver County Clerk and Recorder. There is no indication that the decedent intended to convey the property to Regina or to Margaret as joint tenants with each other or with one of them in addition to the decedent. Therefore, whoever owns the property owns it with the other as tenants in common, not joint tenants.

For the foregoing reasons, the Court finds that the presumption that Mable Braden's domicile on the date of death was in Denver, Colorado, has not been overcome. Jurisdiction for probate of her estate is proper in this Court. The Motion to Dismiss is DENIED.