WILL CONTESTS

CLE in Colorado, Inc.

September 11, 2015

The *Vessels* and *Beren* Cases: The Probate Court's Equitable Powers

Theresa M. Moore, Esq.
The Moore Law Firm, PC
tmoore@tmmpc.com
www.tmmpc.com

In re the Matter of the Estate of Sheldon K. Beren, Deceased, Denver Probate Court Case nos. 1966PR401 and 1966PR100401, is an elective share case that was not closed until September 2, 2010. The Colorado appeals court opinions in the Beren case[1] and the Colorado Supreme Court opinion in *Hickerson v. Vessels*[2] provide the tableau for our consideration of "the Probate Court's Equitable Powers."

Attorneys learn in law school that probate courts, whatever they may be labeled in any given jurisdiction, are courts of equity. In Colorado, the JDF forms control administration and procedure in the probate court to the degree that attorneys and *pro se* litigants rarely have to consider the interplay among statutes, common law and equity in their cases. But the court's equitable powers are an extraordinarily useful tools in probate. They are preserved at §15-10-103 of the Colorado Probate Code: "[u]nless displaced by the particular provisions of this code, the principles of law and equity supplement its provisions."

I. *Summary*

Sheldon Beren died in 1996, less than a year since certain amendments adopted by the Colorado Legislature went into effect. The amendments included a change to the elective share

[1] *In the Matter of the Estate of Sheldon K. Beren*, 2012 COA 2013 M (Beren 2012CA); *Beren v. Beren*, 349 P.3d 233 (Colo. 2015).

[2] *Hickerson v. Vessels*, 316 P.3d 620 (Colo. 2014).

from a fractional share of the augmented estate to a pecuniary amount. *Compare,* Ch. 186, sec. 1, §§ 15-11-201(1), 15-11-207(3)(b), 1981 Colo. Sess. Laws 911, 913 and §15-11-201 (1), C.R.S. 1994. As such there was no issue concerning the right of a surviving spouse to receive income and/or interest on the elective share in cases prior to July 1, 1995, the fractional share automatically took into account the estate's net income, gain, and losses. Whether a spouse receiving an elective share as a pecuniary amount is entitled to interest was not addressed in the 1994 amendments. In the Beren estate it became apparent that the issue as to whether Miriam Beren was entitled to interest on her elective share would be raised. Her attorneys sought instruction and the issue was briefed in early 1999.

On September 23, 1999 Denver Probate Judge, C. Jean Stewart determined that the Code did not expressly provide for interest on the elective share as a pecuniary amount. Even so, it acknowledged the court's power to do equity should distribution to Mrs. Beren be delayed. In 2003 the court cited to estate earnings and awarded "moratory interest" on Mrs. Beren's share, and in 2009 cited its earlier findings and made further findings justifying the exercise of equity to award Mrs. Beren an "equitable adjustment" of $24.5 million based on earnings and income realized by the estate during a specified period of estate administration. After the estate closed in September of 2010, on appeal in Beren 2012CA the Court of Appeals held that the probate court lacked power in equity to adjust the elective share. It ordered that the entire amount, with interest repaid for the benefit of the residuary beneficiaries.

On certiorari, on May 11, 2015 the Colorado Supreme Court disagreed that the probate court lacked authority in equity to address the equities in an elective share case. Citing § 15-10-103 it held that the probate court's equitable authority is reserved to the extent that it is not displaced by other provisions of the Code: "A probate court's traditional powers in equity

supplement and reinforce the statutory directives of the Colorado Probate Code." *Beren v. Beren*, 349 P.2d at 242.[3]

Even though the Supreme Court ruled that the probate court had equitable power to address Mrs. Beren situation, the equitable award had been linked to earnings and income and it was contrary to express statutory provisions for the calculation of the elective share as a pecuniary amount. Remand was ordered for the exercise of equity "consistent with the statutory elective-share framework." *Id*. at 247. Although the precise kind of award on remand is not defined, the court noted: "the probate court's authority to ensure that a party receives the full value of the money it is legally due is not restricted to an award of statutory interest" and "[t]he probate court's equitable authority can also include an award to compensate a surviving spouse for delay in the elective share's distribution." *Id*. at 244.

There are several ironies over the history of the Beren case, not the least of which is that in 1999 Judge Stewart retained authority to award moratory interest "based upon specific facts that reflect a justification for a compensatory award in favor of this spouse," which is what the Colorado Supreme Court ultimately determined was proper – 16 years later.

With its decisions in Vessels and Beren v. Beren the Colorado Supreme Court has rendered two recent opinions clarifying when and how statutory law may circumscribe or define, but not eliminate a court's exercise of its powers in equity. For our purposes, where equity is properly exercised in an elective-share case, the award may not undercut the express statutory framework for arriving at the elective-share amount.

[3] Months prior to *Beren v. Beren* the Colorado Supreme Court issued its opinion in *Hickerson v. Vessels*, 316 P.3d 620 (Colo. 2014) (Vessels), which foreshadowed its holding in the *Beren* case. In *Vessels* the court determined that laches may apply to bar a claim not time barred by the applicable statute of limitations, noting: "laches does not conflict with the statute of limitations; and our case law, since early statehood, recognizes the application of equitable remedies to legal claims." *Id*. 316 P.3d at 622-623.

II. Factual Background -- Proceedings in the Probate Court

Sheldon Beren died in 1996, leaving Miriam Beren, his surviving spouse, and seven children: four sons from his first marriage, a son and daughter from Miriam's first marriage, and a daughter with Miriam. Sheldon was very successful in the oil and gas industry. He held many such interests, including Berenergy, a company he founded and of which he was the sole shareholder. The date-of-death value of the Estate was approximately $73 million. He left Miriam a life estate in most of his assets in the form of a Q-TIP trust, and the residuary to his seven children, each of whom also received a $1 million bequest. To avoid conflict and to provide more of the children's inheritance to them during her lifetime, Miriam Beren took an elective share and gave up control of the estate and its assets. In 1999 her attorneys requested interest on the elective share pending determination and distribution of it to her. Noting that there was no express provision for interest on a pecuniary elective share in our statutes, J. Stewart ruled that "interest on the elective share is a legislative prerogative" that the court may not "graft onto [existing] legislative provisions [for interest]." Yet, the Court "retain[ed] . . its equitable powers to award moratory interest . . . based upon specific facts that reflect a justification for a compensatory award in favor of this particular spouse," citing *Estate of Smith*, 718 P.2d 1069. Order 9/23/1999, Case No. 1996PR401.

After Miriam Beren submitted her petition for determination of the augmented estate in early 2000, several residuary beneficiaries (the sons from Sheldon's first marriage) objected, and litigation to resolve those objections ensued for three years. In late 2003 the Probate Court entered two orders resolving all of the issues. In the second of those decisions dated December 15, 2003, the Probate Court also ruled: ". . . because the estate has experienced earning during the pendency of this litigation, equity requires the Court provide Mrs. Beren an award of interest

in this case." As moratory interest, the court ordered that: ". . . commencing on May 1, 2000 [the date the Court had determined the estate would have been settled but for the litigation] until the date of final settlement and distribution in this case [Mrs. Beren shall be included] in the class of distributee entitled to share pro rata in the distributions of the estate's income that is distributable and is distributed."

Including the 2000-2003 litigation, after the Court's 1999 order estate administration was complicated by a variety of disputes and events, for example:

-- An IRS audit of the Estate Form 706;

-- Failed attempts to settle litigation, and attempts to have failed settlements enforced;

-- Disagreement over asset characteristics and asset values for purposes of determining the augmented estate;

-- Questions and objections by most of the interested persons as to satisfaction of the elective share and liability for moratory interest;

-- Need for initial and amended gift tax return filings after the augmented estate rulings on asset characteristics and valuations;

-- Objections to the personal representative's calculation of the augmented estate and elective share;

-- Repeated objections to the moratory interest award, including objection to the formula set by the court in 2009 for what was then being called an "equitable adjustment";

-- Objection to asset valuations used to calculate the equitable adjustment;

-- One devisee's attempt to disqualify the probate court judge;

-- Objections and briefing related to the personal representative's several petitions for instructions;

-- Multiple updated plans for final settlement and distribution of the estate including challenges to the plans for final settlement; and

-- Objection to the personal representative's request for additional compensation.

By the time the estate was closed in September of 2010, the estate had grown from $73 Million to more than $250 Million. Appeals, including certiorari to the Supreme Court, followed. Presently the case has been remanded to revisit issues related to corporate governance and to "determine . . . what equitable relief is available to the spouse under the specific facts of this case." *Beren v. Beren, supra*, 349 P.3d at 247. It is not yet over.

III. History of Equity in Probate

The Court of Chancery was the court that administered equity in England, and decedents' estate were administered almost exclusively in equity. Dan B. Dobbs, Handbook on the Law of Remedies Damages - Equity - Restitution (1973), at 24, n. 3. These courts developed original equity doctrine, often codified in statutes or adopted and used regularly by law courts as well as equity courts. *Id*. at 24. Even though "in most American states . . . probate courts in one form or another are established separately"[4]:

> . . . Law and equity have been merged in our state since the earliest times of statehood. *Am. Family Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 322 (Colo.2009). The General Assembly recognized this merger in 1877 when it enacted the Code of Civil Procedure[:]
>
> > [T]he distinction between actions at law and suits in equity, and the distinct forms of actions, and suits heretofore existing are abolished, and there shall be in this State but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be the same at law and in equity, and which shall be denominated a civil action . . . Code of Civil Procedure, ch. 1, § 1 (1877); C.R.C.P. 2 (2013).

Vessels, supra, 316 P.3d at 623. In Colorado the probate court is given jurisdiction in equity under C.R.S. § 13-9-103 (3) (b): "The [probate] court has jurisdiction to determine every legal and equitable question arising in connection with decedents' . . . estates . . ." See also, C.R.S.§15-10-302 (2) "The court has full power to make orders, judgments, and decrees and take all other

[4] Dobbs, *Id*. at 24, n. 3

action necessary and proper to administer justice in the matters which come before it." (Emphasis added).

IV. Equity in the Beren Case

A. 1999 Retention of Equitable Power to Award Moratory Interest

In 1999 Miriam Beren sought interest on the elective share under a variety of theories:

-- Under Colorado's prejudgment interest statute at C.R.S. §5-12-102 (applies to wrongful withholding of property, including upon imposition of a constructive trust);

-- That the pecuniary elective-share be treated as an outright devise entitled to interest under C.R.S. §15-12-904 (1996) (one year after original PR's appointment);

-- Payment of a share of net probate income as if the elective share was a pecuniary devise to a trust, which under C.R.S. § 15-1-417 (1996) is entitled to a share of net probate income;

-- Based on the court's broad common law authority to award moratory (equitable) interest on amounts owed where there is no specific statutory provision for interest that is applicable; and,

-- Following Florida practice, award interest from the date the elective share is calculated, to the date of distribution.

The Probate Court declined to adopt any of the proposed theories except to note that it retained its "equitable powers to award moratory interest" citing *Estate of Smith, supra*. Smith concerns the award of interest on an elective share delayed by litigation of the surviving spouse's status and the make-up of the augmented estate. It was decided under the UPC I, when the elective share was a fractional share of the augmented estate. In *Smith*, because of the delay, the court determined that interest on the share was warranted, and specifically cited *Heller v. First Nat'l Bank*, 657 P.2d 992 (Colo.App.1982), a breach of trust case: "The award of interest in a breach of trust action is wholly independent of statute. Whether interest will be allowed, at what rate, and from what date, is wholly in the discretion of the trial court. And, whether simple or compound interest shall be allowed is a question of discretion and fact in each case." *Id*. 657

P.2d at 997-998 "As indicated by the authorities cited in Heller, this language addresses the equitable powers of a court acting independently of statute or contract and, thus, concerns moratory interest." *Estate of Smith*, 718 P.2d 1069, 1074 (Colo.App. 1986). "Moratory interest" had been defined in a 1983 Colorado Lawyer article:

> The term 'moratory interest' is of recent origin and is used to describe the equitable concept of awarding prejudgment interest as a part of common-law damages. In a handful of early decisions, trial courts in Colorado and elsewhere cited to their equitable discretion, rather than statutory authority, as the basis for awarding prejudgment interest as a component of damages.

John C. Tredennick, Jr. and Gregory B. Cairns, Colorado's Prejudgment Interest statute: Potential for Market Rate Interest, 12 Colo.Law 1605 (1983). The Colorado Supreme Court acknowledged moratory interest as a tool in the Beren case: "[E]ven in the absence of a wrongful withholding, the probate court['s findings] justify an equitable remedy to compensate for the excessive delay that deprived [Miriam Beren] of property to which she was legally entitled" and "the probate court may grant Mrs. Beren an equitable award based on a reasonable rate of return on the assets to which she was entitled—the undistributed portion of her elective share." Beren CO2015 at ¶¶ 40-41.

B. December 15, 2003 Equitable Interest Award

In an order dated October 30, 2003 the probate court entered findings and conclusions for the personal representative's use in determining the augmented estate and calculating the elective share. Certain other issues were decided in a follow-up order on December 15, 2003, wherein the court determined that ". . . because the estate has experienced earnings during the pendency of this litigation, equity requires the Court provide Mrs. Beren an award of interest in this case."

The court again cited *Estate of Smith, supra* as authority for the award. In exercising its authority in equity, the court "considered a variety of approaches to the award of moratory interest. . ." The court concluded:

> . . . that it is most equitable to award to Mrs. Beren a rate of interest equal to the rate that is allocated to the remaining distributees. Accordingly, commencing on May 1, 2000 and continuing until the date of final settlement and distribution in this case, the personal representative is ORDERED to include Mrs. Beren in the class of distributees entitled to share pro rata in distributions of the estate's income that is distributable and is distributed.

In subsequent proceedings the probate court directed that the personal representative calculate interest for Mrs. Beren based on the estate's income and earnings/appreciation in asset values from May 1, 2000 (the date the court determined the estate could have been settled but for the 2002-2003 litigation) and December 31, 2007, the date the personal representative predicted the estate could be settled. Significant litigation ensued regarding instructions requested by the personal representative, objection and comment on his petitions for instructions, and objections to the methodology and application of the methodology used to calculate the award.

C. Calculation of the "Equitable Adjustment"

After two days of hearing on asset values, on August 18, 2009 the probate court entered an order summarizing findings and confirming the prior award of moratory interest. For the first time the court began to refer to the award as an "equitable adjustment," and repeated that "[c]urrent Colorado probate law does not provide for an award of legal interest on the elective share." For possibly the first time the court cited C.R.S. §15-10-103 which provides that "the principles of law and equity supplement [the Probate Code's] provisions" in its review of prior findings its application of principles of equity in the case:

> The court directed that the personal representative determine values of the estate on May 1, 2000 and December 31, 2007 and calculate a rate of return during that period. It was the Court's intention that the calculation account for appreciation of

> assets and income to the estate over the selected period. The Court also intended that the calculation would result in a single sum that would be awarded to the widow to adjust for the inequities occasioned by the delays in final distribution to her of the entire elective share.

August 18, 2009 Order at 2. Based on this order, especially, the Colorado Supreme Court opined that the way the probate court exercised its equitable powers, not the exercise itself, was contrary to express Legislative intent.

D. Court of Appeals Ruling in Beren 2012CA

On appeal, the Court of Appeals ordered Mrs. Beren to repay the entire $24.5 Million equitable adjustment. It held that the calculation provisions of the elective-share statute were precise and did not allow for an equitable adjustment. Thus, two provisions of the Probate Code expressly displace the probate court's equitable power to award interest on the elective share. First, the elective share statute itself limits the amount of the elective-share to "an amount not greater than one-half of the value of the augmented estate" §15-11-201(1), C.R.S. Second, §15-12-904, C.R.S. provides interest on pecuniary devises "at the legal rate beginning one year after the first appointment of a personal representative until payment . . ." and the appeals court found that an elective share is not a "devise."

Mrs. Beren petitioned for certiorari to the Colorado Supreme Court arguing that the probate court's equitable power was not displaced by express provisions of the Probate Code concerning calculation of the elective share, and citing to grave injustice caused by the order that she repay $24.5 Million to the estate. Certiorari was granted on her issues[5]:

> Whether the court of appeals erred by holding, as a matter of law, that the Probate Code displaces the authority of the probate court to award an equitable adjustment supplementing a spouse's elective share of the decedent's estate.

[5] David Beren's petition for writ of certiorari as to restitutionary interest on amounts to be repaid by Mrs. Beren was also granted, although he was not successful in his challenge.

> Whether the court of appeals created a grave injustice by invalidating the equitable adjustment in isolation and ordering the petitioner, Miriam Beren, to return $24.5 million, plus interest, completely disregarding that the equitable award was integral to administering the estate over the course of 15 years.

E. Ruling on Writ of Certiorari

The Colorado Supreme Court ruled that §15-11-202(1) fixes the value of the property comprising the augmented estate on the decedent's date of death. It controls over general equitable authority the probate court may exercise under §15-10-103, and the probate court erred when it linked its equitable award including appreciation and income to the entire augmented estate. Even so, §15-10-103 expressly reserves the probate court's equitable authority to the extent it is not displaced by a specific statutory provision. "This case is an exceptional one where failure to invoke equity would lead to injustice. ¶ The probate court correctly determined that use of its equitable authority was necessary to the disposition of this case." *Beren v. Beren, supra,* 349 P.3d at 242.

The court laid out two examples for making a proper equitable award on remand. First, although the plain language of the elective share statute requires deduction of administration expenses from the augmented estate before arriving at the elective share pecuniary amount, the Court reasoned: ". . . nothing in the Code precludes a probate court from granting an equitable adjustment based on excessive administrative fees when justice so requires." Because "there is no evidence that the administrative expenses here were connected to the increase in value of the estate" adjusting them, or making an award to Mrs. Beren because of them, does not conflict with the elective share statute.

Second, the Court concluded that the probate court has equitable authority to award a reasonable rate of return, based on statutory interest or otherwise, as compensation for the delay in distribution: "While interest is usually a creature of statute, the probate court may use its

equitable authority to ensure that a party receives the true value of [the] elective share when distribution has been unduly delayed." *Beren v. Beren*, 349 P.3d at 244. The court disagreed with the Court of Appeals interpretation of *Farmers Reservoir & Irrigation Co. V. City of Golden*, 113 P.3d 119, 132-33 (Colo. 2005) when it held that equitable or "moratory" interest is only justified where there has been a finding of "wrongful withholding." Instead, ". . . even in the absence of a wrongful withholding, the probate court made sufficient findings to justify an equitable remedy to compensate for the excessive delay that deprived her of property to which she was legally entitled." *Beren v. Beren*, 349 P.3d at 245.

V. Conclusion

The effect of the Court of Appeals opinion was to sharply circumscribe the probate court's powers in equity. In the present case Mrs. Beren would have realized some $26 Million as an elective share paid in cash, without interest or gain of any kind, that was not fully distributed to her until June of 2011, while the residuary beneficiaries would enjoy all the income and appreciation of an estate that grew to$250 Million by the time the estate was closed. As the Supreme Court noted, failure to invoke equity would lead to injustice.

The Colorado Supreme Court's 2015 opinion essentially mirrors the Denver Probate Court order of September 1999 because it finds that the probate court has authority in equity to make awards where circumstances warrant, so long as any specific provision of the Code is not expressly violated.[6] In *Vessels* and *Beren v. Beren*, both written by Justice Hobbs, the Supreme Court parses express statutory language to identify the places where common law and equity

[6] For an example of the reverse *see Wirt v. Prout*, 754 P.2d 429 (Colo.App. 1988) where the court held that imposition of a constructive trust to pay decedent's health care professionals improperly reduced the surviving spouse's exempt property allowance: ". . . equity's intervention by the imposition of either a constructive or resulting trust would judicially amend a clearly stated beneficent legislative policy in favor of surviving spouses and impermissibly invade the province of the General Assembly . . ."

have or have not been displaced, effectively preserving Colorado courts' ability to correctly apply the law and do justice.

Certain interests have lobbied the Colorado Legislature to change the law/result of *Vessels*. House Bill 15-1272 "Concerning a prohibition on the use of the doctrine of laches to bar a claim timely filed under that statute of limitations" apparently did not make it out of committee this session.[7] Passage of this bill would be lamentable to the extent it limits the probate or district courts to "do equity" when warranted. In the meantime, the Court of Appeals has already cited *Beren v. Beren* in support of courts' powers in equity: "But the power to determine the components of such a[n equitable] remedy is within the court's discretion. *Beren v. Beren*, 2015 CO 29, ¶ 12." *Zeke Coffee, Inc. v. Pappas-Alstad Partnership,* 2015COA104 (restitution remedy for wrongful eviction).

Beren v. Beren and *Vessels* provide practitioners and courts comprehensive guidance to determine when equity may be properly applied, thus preserving the probate court's equitable powers.

[7] In *Vessels* the Supreme Court notes that the partial payment doctrine, relied on by the plaintiff to extend the statute of limitations, is "part of our common law jurisprudence." It is not express in the statute of limitations provisions.