

Statutes of Limitation in Probate and Trust Litigation

by Kelly Dickson Cooper, Elizabeth T. Meck, and Jessica Schmidt

This article addresses several statutes of limitation in the context of probate and trust litigation as well as important exceptions to the general rules. It includes a discussion of how the Colorado Probate Code differs from the Uniform Probate Code.

This article addresses the general statute of limitation in probate proceedings and exceptions to it, which deviate from the Uniform Probate Code (UPC). The laches defense to the exceptions is also covered.

Other statutes of limitation of interest to probate and trust litigators, concerning breach of fiduciary duty, final accountings, and equity actions are also discussed.

Time Limit to Initiate an Action to Probate a Will

For those unfamiliar with testacy proceedings, the Colorado Probate Code governs all probate proceedings, including the time limit for probating a will. Generally, the statute of limitations to initiate an action to probate a will, whether formally or informally, is three years after the death of the testator.¹ The three-year time limit is modeled after the UPC's time limit to probate a will under UPC § 3-108. However, Colorado, along with some other original UPC states, created a significant exception to this general rule, which is discussed below.²

Exception to the Three-Year Rule to Probate a Will

There are exceptions to the statute of limitations in CRS § 15-12-108(2) for proceedings to construe probated wills, proceedings to determine heirs of an intestate and related appointments, and notably, for situations in which proceedings have not commenced.

This article discusses the latter exception, contained in CRS § 15-12-108(2)(c). It addresses what happens when a decedent dies testate but the will has not been submitted to formal or informal probate. In this situation, CRS § 15-12-108(2)(c) allows for probate of the will "if no previous testacy proceedings or proceedings determining heirship relating to the decedent's estate have been concluded in this state." This section creates a broad exception allowing for probate of a will that has not been previously submitted for probate in Colorado.

Oil and Gas Leases. The exception is easily illustrated in the context of oil and gas leasing. Companies seeking to lease mineral interests want to ensure that they are taking a lease from the rightful owner of the interest, and heirs and devisees of former mineral interest owners want to determine their rights to ownership of the minerals. For example, a client who is an oil and gas producer may be purchasing a lease interest covering certain oil, gas, and minerals or making royalty payments based on an affidavit of heirship. The client may be uncomfortable relying solely on such affidavit, particularly if the interest is large, because this may create an unacceptable business risk. If the client finds a will that covers the interest it would like to purchase, but the testator died more than three years ago, the exception becomes important. The exception could be used here to probate the will such that the decedent's interests would be properly distributed and the client's position as the rightful owner of the lease solidified.

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If a will has been probated or it is clear that the deceased did not leave a will, the interests may be relatively straightforward and may be determined simply by reopening a probate or seeking an intestacy determination.³

While the exception has not been addressed by a Colorado appellate court, in two cases involving oil, gas, and mineral rights a Colorado district court has held that the scope of Colorado's exception is as broad as it appears on its face. In both cases, the court analyzed the CRS § 15-12-108(2)(c) exception and concluded that the three-year statute of limitations did not bar the probate of wills that otherwise would have been far outside the limitations period.⁴

In re Woodward. In the first case, *In re Woodward*, petitioners moved for summary judgment based on the argument that the three-year statute of limitations precluded the respondents from filing a formal testacy proceeding. Petitioners were the daughter of the decedents and an oil exploration company holding a lease to produce oil and gas signed by the daughter. Respondents were the grandson of the decedents and another oil exploration company that purchased the grandson's interests in the same oil, gas, and mineral interests claimed by the petitioners.

There were two wills at issue in this case, one for a decedent who had died 35 years before, in 1979, and one for a decedent who had died 17 years before, in 1997. The respondents argued that the three-year limitations period did not apply to the probate of these wills because the provisions of CRS § 15-12-108(2)(c) allowed the wills to be admitted in a Colorado testacy proceeding where, as here, no proceedings to determine testacy or heirship for the decedents had been concluded in the state.

The court initially granted summary judgment. However, after reviewing the legislative history of CRS § 15-12-108(c), the court reconsidered and concluded that the respondents were not time-barred from probating the wills.⁵ The court reasoned that “[b]y amending the statute [in 1977] through the addition of C.R.S. §15-12-108(2)(c) . . . the General Assembly intended to remove the three-year time bar for commencing a formal testacy proceeding if no previous testacy proceedings have been concluded in this state.”⁶ This case was not appealed.

In re Cable. The second case, *In re Cable*, proceeded similarly. The petitioners filed a Motion for Determination of a Question of Law based on the same argument made in *Woodward*—that the three-year statute of limitations barred the admission of a will that had never been probated. Petitioners were a company involved in oil and gas and multiple family members claiming rights to the decedent's oil and gas lease interest through her second husband. Respondents were the son-in-law and grandson of the decedent and an oil and gas exploration company that had acquired leases from the son-in-law and grandson to explore and produce the same oil, gas, and mineral interests. In this case, the decedent died in 1960, more than 54 years before the case was filed. The will had been filed with a Michigan court but had never been probated in Colorado or any other state. The court cited *Woodward* with approval and likewise concluded that the exception to the three-year statute of limitations found in CRS § 15-12-108(2)(c) applied and the statute of limitations did not bar the will from probate.⁷ This case also was not appealed.

The Weld County trial courts' opinions are not binding authority, but their interpretation is consistent with previous interpretations of other provisions of the Colorado Probate Code.⁸ Perhaps most important, by allowing the wills to be probated, these rulings follow the fundamental principle that the testator is free to dispose of property through a will as she pleases and that her intentions should be honored.⁹

Colorado Law Differs from UPC

A practitioner should expect to be confronted with the arguments made in *Woodward* and *Cable* any time a case involves a decedent who died more than three years before an attempt is made to probate his will. The party opposing probate and seeking to enforce the statute of limitations in this situation may cite to UPC §§ 3-102 and 3-108 and the associated comments.¹⁰ For example, the comment to UPC § 3-102 states:

The requirement of probate stated here and the limitations on probate provided in Section 3-108 mean that questions as to testacy may be eliminated simply by the running of time. Under

these sections, an informally probated will cannot be questioned after the later of three years from the decedent's death or one year from the probate whether or not an executor was appointed, or, if an executor was appointed, without regard to whether the estate has been distributed. If the decedent is believed to have died without a will, the running of three years from death bars probate of a late-discovered will and so makes the assumption of intestacy conclusive.

However, this type of language should not affect the statute of limitations analysis in Colorado because the legislature chose to enact CRS § 15-12-108(2)(c), which is inconsistent with the UPC statute of limitations. Colorado's departure from the UPC in this regard should strengthen the argument that Colorado's exception is intentional and should be construed broadly.

Caution in Relying on Colorado's Exception: Laches

While a will that may fall into Colorado's exception may not be barred from probate, practitioners should be prepared for other defenses that an opponent may raise during a probate proceeding. For instance, the opponent to the probate of a will may assert laches in response to an action filed a long time after a decedent's death. This is likely to occur if the will opponent has expended resources in an attempt to obtain title or has relied on royalties or other income resulting from rights to the land.

Laches is an equitable defense that is particularly applicable in the oil and gas context.¹¹ Under the doctrine of laches, the time for filing a claim may be limited if the claimant knew of the potential action and unreasonably delayed pursuing the claim. A claimant is required to assert a claim without delay when it has notice of the potential action.¹² It is considered unjust to permit "one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit."¹³

In this context, the Colorado Supreme Court has held that laches can apply even where the statute of limitations has not expired and a claim is timely filed.¹⁴ Therefore, even though the statute of limitations may not bar the probate of a will, laches may apply when many years have passed since the decedent's death and the proponent of the will knew of its claims to the mineral interest but failed to probate the will. Finally, even if a court does not permit the probate of a will, the will may yet be admissible as evidence.¹⁵

Breach of Fiduciary Duty

Breach of fiduciary duty is one of the more common claims in probate and trust litigation. The statute of limitations period for breach of trust or breach of fiduciary duty requires commencement of an action within three years after the cause of action accrues.¹⁶ A cause of action accrues "on the date the breach is discovered or should have been discovered by the exercise of reasonable diligence."¹⁷ Issues frequently arise in determining exactly when the breach was or should have been discovered. Practitioners should have clients carefully document when they first became aware of any potential issues and claims.

Final Accountings

If a trustee provides a "final accounting," the statute of limitation for a breach claim against the trustee is shortened to six months. To

gain the benefit of the shortened statute of limitation, the final accounting must fully disclose the matter and show termination of the trust relationship between the trustee and the beneficiary.¹⁸ The trustee's accounting must provide "sufficient information to put interested persons on notice as to all significant transactions affecting administration during the accounting period."¹⁹ Determining the meaning of "significant" and "sufficient" will continue to be issues that are litigated when this shortened statute of limitation is used as a defense to claims by beneficiaries.

Equity Actions

If relief under Colorado law is insufficient or unjust, equity actions are available. Equity actions frequently arise in the context of will and trust litigation, but will be barred based on the applicable limitations period to the legal claims.²⁰

An equitable action in the context of probate and trust litigation often includes an action for a constructive trust. A "constructive trust" is an equitable remedy employed when the law is deficient in preventing or remedying an injustice when an individual (particularly an individual in a fiduciary capacity) has been unjustly enriched.²¹ A constructive trust claim may arise in an undue influence action, for example, when the rightful transferee of the decedent's property is deprived of the property because it was transferred to an individual who unduly influenced the testator. This equitable remedy may raise unique statute of limitation issues, however, and it is important to be aware of these issues. For example, the Colorado Court of Appeals has held that a constructive trust claim accrues at the time of discovery of the defendant's breach of trust, not upon the initial transfer of property.²²

Conclusion

Statutes of limitation will continue to be a source of dispute in the area of probate and trust litigation in situations where probate was not properly completed in Colorado. Practitioners should pay careful attention when advising clients on their need to object to accountings, probate wills, and their right to assets and income from those assets.

Notes

1. CRS § 15-12-108(1) states that "[n]o informal probate or appointment proceeding or formal testacy or appointment proceeding . . . may be commenced more than three years after the decedent's death . . ."; *In re Estate of Kubby*, 929 P.2d 55, 56 (Colo.App. 1996) (establishing that CRS § 15-12-108 sets the statute of limitations).

2. See UPC § 3-108, cmt.

3. The various options and issues associated with transferring after-discovered mineral interests and leases are addressed in Kirch and Cappillino, "Dealing With a Decedent's Mineral Interests," 44 *The Colorado Lawyer* 53 (Feb. 2015), www.cobar.org/tcl/tcl_articles.cfm?articleid=8802.

4. *In re Woodward*, No. 2014 PR 30028 (Weld County Dist. Ct. July 22, 2014) (unpublished) (denying petitioner's motion for summary judgment that argued that probate of wills should be barred by statute of limitations); *In re Cable*, No. 2014 PR 30424 (Weld County Dist. Ct. Oct. 17, 2014) (unpublished) (adopting the reasoning from *In re Woodward* and applying the exception to the statute of limitations found in CRS § 15-12-108(2)(c)).

5. *Woodward*, No. 2014 PR 30028.

6. *Id.*

7. *Cable*, No. 2014 PR 30424.

8. *Hill v. Martinez*, 87 F.Supp.2d 1115, 1121 (D.Colo. 2000) (quoting CRS § 15-12-108(2)(c) to hold that the appointment of a personal representative is not time limited "if no previous testacy proceedings or proceedings determining heirship relating to the decedent's estate have been concluded in this state."). See also Meyer, "A Potpourri of Probate Practice Aids," 11 *The Colorado Lawyer* 1850 (July 1982).

9. See *Breeden v. Stone*, 992 P.2d 1167, 1170 (Colo. 2000); *In re Paulsen's Estate*, 158 P.2d 186 (Colo. 1945).

10. See UPC § 3-102, cmt.; UPC § 3-108.

11. *Patterson v. Hewitt*, 195 U.S. 309, 321 (1904) (noting "there is no class of cases in which the doctrine of laches has been more relentlessly enforced").

12. *Duncan v. Colorado Inv. & Realty Co.*, 178 P.2d 428, 430 (Colo. 1947).

13. *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587, 593 (1876).

14. *Hickerson v. Vessels*, 316 P.3d 620 (Colo. 2014).

15. CRS § 15-12-901(1)(c) states: "[a] duly executed and unrevoked will that is not a will probated in this state may be admitted as evidence of a devise if: (I) A court proceeding concerning the succession or administration of the estate has not occurred; and (II) Either the devisee or his or her successors and assigns possessed the property devised in accordance with the provisions of the will, or the property was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings."

16. CRS § 13-80-101(1)(f).

17. CRS § 13-80-108(6).

18. CRS § 15-16-307.

19. Colo.R.Prob.Proc. 31.

20. See *Interbank Investments, LLC v. Vail Valley Consol. Water Dist.*, 12 P.3d 1224, 1229 (Colo.App. 2000) ("a court 'will usually grant or withhold relief in analogy to the statute of limitations relating to actions at law of like character'") (quoting *Brook v. Bank of Boulder*, 911 F.Supp. 470, 477 (D.Colo. 1996)).

21. See *Page v. Clark*, 592 P.2d 792, 797 (Colo. 1979). See also CRS § 38-10-107 (regarding constructive trusts as a remedy under the statute of frauds).

22. *Eads v. Dearing*, 874 P.2d 474 (Colo.App. 1993). ■