



# BOULDER COUNTY BAR ONLINE NEWSLETTER

1942 BROADWAY, SUITE 205  
BOULDER, CO 80302

303-440-4758  
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## TRUSTS AND DIVISION OF PROPERTY IN COLORADO

# M A R C H 2 0 0 2

### AFTER *BALANSON AND GORMAN*

By Shelly D. Merritt

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Trusts are commonly used in estate planning for a number of reasons. Two of the primary reasons for the use of trusts are to take maximum advantage of the exemptions against estate taxes and to provide protection to the beneficiary from himself (if the beneficiary is too young or otherwise unable to handle money) and from the beneficiary's creditors. Most, if not all, trusts contain what is referred to as "spendthrift" language. Typical spendthrift language provides that the beneficiary does not have any right to anticipate, alienate, sell, transfer, assign, pledge, encumber or otherwise dispose of any part of the assets of the trust, nor shall the interest of a beneficiary in any part of the trust estate be liable for the debts or obligations of the beneficiary or subject to attachment, garnishment, execution, claims of creditors or other legal

or equitable process of law. Trust law provides that, where a person creates a trust for another individual and the trust contains spendthrift language, the beneficiary of the trust cannot assign the interest nor can the beneficiary's creditors reach it. One of the most likely "creditors" of a beneficiary is a divorcing spouse. Until recently, it was thought that the assets of a spendthrift trust were beyond the reach of a divorcing spouse.

Those of us who practice in the areas of estate planning and family law have been struggling to decipher the meaning and effect of two recent Colorado cases involving division of marital property where one spouse is the beneficiary of an irrevocable trust created by his or her parent. In *In re Marriage of Balanson*, 25 P.3d 28 (Colo. 2001), the Colorado Supreme Court ruled that a wife's interest in an irrevocable trust was a property interest and the appreciation in the value of that interest during the wife's marriage was marital property subject to division upon divorce. The trust involved in this case was created by the wife's mother

#### MARK YOUR CALENDARS! FRIDAY, APRIL 26, 2002

##### WHAT'S NEW IN LAW OFFICE TECHNOLOGY

Learn about the latest in law office technology tools, including hardware, software, and gadgets to increase your productivity and improve your bottom line.

Speaker: Larry C. Smith, Law Office Consulting Services  
8:30 - 11am See page 6 for details

(continued on page 4)

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
					1	2
3	4	5	6	7	8	9
10 Foundation Dinner	11	12 Emp.	13 Crim.	14 Bus.	15	16
17	18	19	20 Fam/ADR	21	22	23
24/31	25	26	27	28	29	30

## MEMBERSHIP BENEFITS

### Justice Center ID Card

Our Bar issues a picture ID card for its members, which allows access into the Justice Center "Frisk-Free" (this means no standing in line, no searches, and no X-rays). The ID's are available for \$25 the first time and can be renewed for \$10 each year.

To obtain an original ID send a check for \$25 to the Bar office along with a small passport type photo and a photocopy of your current, valid, Colorado Supreme Court issued Attorney Registration Card. We will laminate it with a current year sticker.

To renew your ID just send a check for \$10 to the Bar office indicating that it is for a renewal. We'll send you a sticker for the next year. Justice Center ID's are for attorneys only, not paralegals or other staff.

### Advertising

Members receive discounted advertising rates for Classified Ads and Announcements in the monthly newsletter. Non-member rates are an additional \$10.  
 \$20 up to 30 words  
 \$30 up to 40 words

\$40 up to 70 words

\$50 up to 100 words

All deadlines are the 10th of the month or the next business day if on a weekend. Fax or mail a copy of your ad to the Bar office. Payments are due with ad; we do not bill.

### Legal Directory

All members receive a free "Legal Directory" which lists Boulder County Bar members. Additional copies are sold for \$10. The 2001 Legal Directory is on the website in the Members Only Section.

### Mentor/Mentee Program

The goal of the Mentoring Project is to provide support for new admittees to the practice of law and to acquaint them at an early stage with the highest level of professionalism and ethics and familiarize themselves with the Boulder legal community. Mentees must have been in practice for less than three years. Mentees are required to have passed the Colorado Bar and maintain an appropriate level of malpractice insurance. Anyone wishing to be a mentor should contact the Bar office. Anyone who wishes to be assigned to a mentor should contact

the Bar office and request a "Mentee Application."

### Mailing Lists/Labels

The current Bar Association list is available to members for \$50 and non-members for \$75. Mailing labels for members cost \$100 and non-members \$150. Section lists are available free to members and section labels for \$40. For non-members section lists cost \$20 and labels \$60. BCBA membership lists are sold for primarily legal educational purposes that will benefit the BCBA membership. They will not be sold for political, fundraising, or business generation purposes.

### Web Page

We are online at <http://www.boulder-bar.org>. The website now has a Members Only Section with Court opinions and continues to grow for your membership benefit. You can be listed in the "Find A Lawyer" Section in your speciality area. Call the bar office to sign up.

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# VALIDITY OF CONTRACT PROVISIONS CONDITIONING ENTITLEMENT TO COMMISSIONS ON EMPLOYMENT AT THE TIME OF CLOSING

By Joel Maguire

2001 was not good for salesman John Smith, but he told his family that this year would be different. During the last three months, John sold 15 homes in his employer's new subdivision. A few of these might fall through, but he would be getting a nice string of commissions when construction was complete and the transactions closed.

The next morning John's boss called him into his office. To his dismay, John was being terminated as a result of "restructuring." John was out of a job, but he remembered being told that terminated salespersons were still entitled to receive their commissions when their sales closed. However, when he asked for confirmation, he was reminded that his employment agreement stated that he was not entitled to a commission unless he was employed at the time of closing and funding. Does John have any recourse?

In *Hofer v. Polly Little Realtors (Colo. 1975)*, two real estate salesmen were terminated by their broker after they had obtained a buyer but before closing. The trial court found, and the Court of Appeals agreed, that they were entitled to payment of their commission upon completed sale of the property. The Court of Appeals found that it would be "patently unjust" if salesmen employed on commission basis could be terminated with impunity prior to a closing and thus deprived of large commissions obtained for their employers as a result of their efforts. The question, therefore, is whether this same "patently unjust" result can be imposed by including a term in the contract requiring employment at the time of closing.

In *Moorman Manufacturing Co. v. Rivera (Colo. 1964)*, the contract stated that the employee "is to receive no commissions on future orders until they have been shipped and no commissions whatsoever if they have been shipped after termination of this contract." The trial court found the contract ambiguous, but then concluded that it was not necessary to determine the proper construction of the language, since the provision was unenforceable as a forfeiture if read to preclude payment of a commission after termination. The trial court held that the language "creates a bald, unadulterated and unqualified penalty or forfeiture of commissions legitimately earned for which the plaintiff should be paid" and stated that "accepted literally, this provision of the contract is unconscionable, arbitrary and unreasonable and results in an unjust enrichment of the defendant."

The Supreme Court agreed with the trial court's finding of ambiguity but then sidestepped the question of unconscionability by interpreting the contract to give the employer merely the right to defer payment of earned commissions until unpaid accounts had been collected. "That would seem to be the appropriate construction to place upon this contract, assuming that the forfeiture clause can, on any theory, be sustained."

The trial court's comments in *Moorman* provide one court's opinion that any agreement requiring employment at the time of closing is unconscionable. However, since the Supreme Court did not rule on that basis, *Moorman* cannot be cited for the proposition that this

*continued on page 14*

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## TRUSTS AND DIVISION *(continued from page 1)*

upon her death, which occurred during the marriage. The terms of the trust provided that all income of the trust was to be distributed to the wife's father during his lifetime. The trustee had the discretion to invade the corpus of the trust for the support, care, and maintenance of wife's father. The wife's father was the trustee. Upon the father's death, the trust would be divided into equal shares for the wife and her siblings and would be distributed to them outright. The wife's father was still living at the time the case was decided. Therefore, the trust assets could have been exhausted prior to the father's death.

The Colorado Court of Appeals took this one step further in *In re Marriage of Gorman*, 36 P.3rd 211 (Colo.App. 2001), by holding that a husband's interest in a revocable trust created by his mother, who was still alive, was also a property interest, even though the husband's mother could revoke the trust at any time. The husband's mother was the sole beneficiary of the revocable trust during her lifetime. Only after her death was he

entitled to anything. The court ruled that the appreciation during the marriage in the value of the husband's interest was marital property subject to division upon divorce. The Court acknowledged that it might be difficult to value the husband's interest but found it to be possible. The court suggested that, after the present value of the husband's interest was determined, the trial court could postpone the actual division of that value until the husband came into possession of the property. The court stated that the trial court could consider the husband's interest in the revocable trust in determining an equitable division of all marital property.

Prior to these two decisions, the Colorado Supreme Court had held that what seemed to be similar interests in trusts were "mere expectancies" and not property interests and therefore not subject to division upon divorce. See *In re Marriage of Rosenblum*, 602 P.2d 892 (Colo.App. 1979); *In re Marriage of Jones*, 812 P.2d 1152 (Colo. 1991). The question that is being asked is what makes the trusts in *Balanson* and *Gorman* different from the trusts in *Rosenblum* and *Jones*. The primary difference appears to be the fact that the trusts in *Rosenblum* and *Jones* would last for the beneficiary's lifetime and would never vest outright in the beneficiary, whereas the trusts in *Balanson* and *Gorman* would eventually pass outright to the beneficiary after certain conditions had been met. The courts held that the interests of the beneficiaries in these trusts were therefore "vested" property interests (i.e., the beneficiary has a right to actual possession of the property at a future date), even though the interests were subject to divestment if certain condi-

tions, such as the beneficiary surviving, were not met.

According to the law on trusts, the spendthrift nature of the trust would prohibit the Court from forcing the trustee to distribute any of the trust property to the beneficiary or his or her spouse. The Courts in the *Balanson* and *Gorman* cases indicated that the trust property itself may be subject to division, but did not go so far as to say that the trustee would be required to distribute the trust assets. The Courts did not decide how an equitable division of assets can be made if the trust cannot be invaded and the spouses have few other assets to divide. In *Gorman*, the Court of Appeals suggested waiting until the beneficiary spouse actually comes into possession of the interest. What the court did not address is the possibility that the husband's mother may revoke the trust and terminate the husband's interest altogether. Division of the property between the spouses would already have been made taking the trust into account, leaving the husband with less than an equitable division. If the court were to rule that the trust property must be distributed to the beneficiary spouse, what would be the next step? Would all other types of creditors be able to reach the assets of a spendthrift trust? This would be contrary to case law that has developed over the last hundred years.

Another question that arises is how the husband's interest in his mother's revocable trust in the *Gorman* case is any different from an expected interest under a parent's will. A revocable trust is used by estate planners as a

*continued on page 12*

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# PRESIDENT'S PAGE

## FLASH IN THE PAN

BY JERRY RETHERFORD, PRESIDENT OF THE EL PASO COUNTY BAR ASSOCIATION

*I am a mere flash in the pan. I take solace in the fact that nobody remembers who the judge was in the Lindbergh case, the William Kennedy-Smith case, the Mike Tyson case...this will all pass.*

*Lance Ito, judge in the O.J. Simpson case*

Fortunately for Judge Ito, this statement is probably true. Unfortunately for the many judges who have made a positive difference in the administration of justice, this statement is also true.

Several months ago while channel surfing, I ran across a PBS documentary on the trials of the "Scottsboro Boys." Judge James Edwin Horton, Jr., a name you probably do not recognize, was a judge in one of the trials. He was not a mere flash in the pan.

On March 25, 1931, a group of nine black teens ranging in age from 12 to 19 were hoboeing on the Southern Railroad from Chattanooga, Tennessee, when a fight between white teens and the black teens occurred. A posse arrested the black teens and took them to jail in Scottsboro, Alabama. After their arrest, two white women climbed off the train, and, after apparently being coached by the deputy sheriff, accused the black boys of rape.

As you might expect, justice was rather swift in Alabama in 1931, and the trial of the black teens began 12 days after their arrest. After three consecutive days of trial, involving four different juries, all were convicted and sentenced to death save one of the boys, a 13 year old, who was sentenced to life. You may be won-

dering whether the boys were represented by defense counsel. They were; the rather infamous court appointed defense team of Stephen Roddy, an out-of-state real estate lawyer, who was drunk during the first day of trial, and 69 year old Milo Moody, a lawyer some thought was senile. The attorneys took a half - hour to interview their clients before trial, offered no cross examination of the state's medical evidence and presented no closing arguments.

From your constitutional law class, you may recall the case of *Powell v. Alabama*, 287 U.S. 45 (1932), which overturned the convictions of the Scottsboro Boys on the basis that the State of Alabama denied the defendants' rights to competent counsel given them under the 14th Amendment.

To make things interesting, the Communist Party rushed to make the Scottsboro case their own, beating out the NAACP. They retained a well known New York criminal attorney, Samuel Liebowitz, to represent them in the new trial. Liebowitz was 37 years of age and had achieved stardom in New York by obtaining 77 acquittals in 78 trials. Alabama's Attorney General, Thomas Knight, Jr., son of Thomas Knight, Sr., who had authored the Alabama Supreme Court decision that was reversed by the U.S. Supreme Court, was the prosecutor in the retrials. As you might expect, as a New York Jew hired by the Communist Party, Liebowitz was not well received in the small town of Decatur, Alabama, located 50 miles from the Klu Klux Klan's birthplace.

Judge Horton was appointed to retry the case. The retrial of Haywood Patterson occurred first. The jury selected was all white since blacks were never placed in the jury pool or called. The jury found Patterson guilty of rape and sentenced him to die in the electric chair.

Judge Horton reconvened the Court on June 22, 1934 to hear arguments of the defendant's motion for a new trial. Liebowitz, who thought his motion would be denied, did not even show up for the hearing. However, with opening remarks, Judge Horton began reading in a deliberate manner the following:

*Social order is based on law, and its perpetuity on its fair and impartial administration. Deliberate injustice is more fatal to the one who imposes it than to the one on whom it is imposed. The victim may die quickly and his suffering cease, but the teachings of Christianity and the uniform lesson of all history illustrate without exception that its perpetrators not only pay the penalty themselves, but their children through endless generations...*

*Opinion of Judge Horton*

After reading from his typed ruling for an hour, Judge Horton granted a new trial to Patterson.

Although not so remarkable today, in light of the time and place of his decision, he rendered an extremely courageous decision.

Horton was up for reelection in 1934. He did not want to seek reelection, knowing he would be defeated, but was presented a petition signed \_\_\_\_\_ continued on page 13

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# CALENDAR OF EVENTS

Pre-registration is required for BCBA CLE luncheons. Please send a check to the Bar office at least 3 days in advance. BCBA CLE's cost \$12 per credit hour for members and \$18 for non-members unless otherwise noted. Young Lawyer Section Members pay only \$5 for CLE programs. Materials are \$5 without CLE credit.

**March 12, 2002**

**Employment Law Section**

Topic: Same Sex Couple and Domestic Partner Benefits

Presenter: TBA

Noon at Faegre & Benson

Box Lunch \$10

(Turkey, Veggie or Beef)

CLE \$12

**March 13, 2002**

**Criminal Law Section**

Topic: Polygraph

Presenter: Lawson Hagler, Accountability Polygraph Services

Noon Brown Bag Lunch

Boulder Justice Center Courtroom C

CLE \$12

**March 14, 2001**

**Business Law Section**

Topic: Update of Colorado Law Affecting Business

Presenter: Marc Loewenstein

Noon at Dolan's in Boulder

Lunch \$13 CLE \$12

**March 20, 2002**

**Family Law and ADR Sections**

Topic: Collaborative Divorce Round II.

A further elaboration on the concept and a discussion of recent developments and related matters that divorce lawyers should know.

Speaker: Sheila Gutterman

Noon Brown Bag Lunch

Boulder Justice Center Courtroom D

CLE \$12

**April 2002**

ADR Section & CCMO of Boulder

5th Annual Dialog with the 20th

Judicial District Judges - Civil Issues

Details to come

**April 4, 2002**

**Natural Resources/Environmental Law Section**

Topic: Takings Update

Presenter: TBA

Noon Brown Bag Lunch

Boulder Justice Center

Courtroom C CLE \$12

**April 9, 2002**

**Employment Law Section**

Topic: Mechanics of Colorado's Wage Statute

Presenter: Joel Maguire, Martin and

Mehaffy, Noon at Faegre & Benson

Box Lunch \$10 (Turkey, Veggie or

Beef) CLE \$12

**April 10, 2002**

**Criminal Law Section**

Topic: DRE

Presenter: TBA

Noon Brown Bag Lunch

Boulder Justice Center

Courtroom E

CLE \$12

**Real Estate & Tax, Estate Planning and Probate Sections**

Topic and Presenters: TBA

12 Noon at Dolan's in Boulder

CLE \$12, Lunch \$13

**April 16, 2002**

**Business Law & Intellectual Property Sections**

Topic: Methods of Doing Business

Patents Presenters: TBA

Noon at Dolan's in Boulder

Lunch \$13 CLE \$12

**April 17, 2002**

**Family Law Section**

Topic: Cross-Examining the Business Valuation Expert

What divorce lawyers should know in order to effectively evaluate and cross-examine business valuation experts.

Presenter: Eric Critchfield, CPA

Noon Brown Bag Lunch

Boulder Justice Center

Courtroom D CLE \$12

**April 25, 2002**

**Boulder County Bar Association Past Presidents' Dinner**

Le Chantecler Restaurant

6 pm Details to follow

**April 26, 2002**

**What's New in Law Office Technology**

Speaker: Larry C. Smith, Law Office Consulting Services

8:45-11am at Faegre & Benson

in Boulder

\$40 members, \$25 young lawyers

2 hours of CLE credit -

ethics and general applied for

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**THE 2002 LEGAL AID WINETASTING FUNDRAISER**

**A HUGE SUCCESS DUE TO GENEROUS DONATIONS FROM:**

**JUDICIAL ARBITER GROUP (J.A.G.)  
LIQUOR MART CHAUTAUQUA DINING HALL  
and HOLLAND & HART, LLP**

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GOFF & GOFF, LLC • BERNARD, LYONS, GADDIS & KAHN, PC  
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**Attorneys, Accountants, Professionals**

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3-story stone and glass building with FREE PARKING located in wooded area next to hiking trails.  
Easy walk to Boulder mall and Justice Center. Cross referrals with successful law firm including reception services, kitchen, library and conference facilities.

Top floor corner office with established law firm ahs view of Flatirons. \$1600/month  
First floor suite has two vacancies with easy access. View to Eben Fine Park. \$625 and \$550/month.

**STEVENS, LITTMAN, BIDDISON & THARP, LLC**

Contact Andy Littman or Dennis Tharp  
tel:303.443.6690 fax:303.449.9349  
e-mail: tharp@slb-llc.com

# LAWYER ANNOUNCEMENTS

## WELLS, LOVE, & SCOBY, LLC

is pleased to announce that

### DAVID G. EISENSTEIN

has become a member of the Firm.

*His practice will continue to emphasize real estate, land use, zoning and planning.*

255 Canyon Boulevard  
Boulder, CO 80302

Telephone: 303.449.4400  
Fax: 303.449.6227

## COHEN & SILVERMAN, LLP

We are pleased to announce that the name of our firm has been changed to

### COHEN SILVERMAN ROWAN LLP

*Cohen Silverman Rowan LLP specializes in promotional marketing law. Offline and online, from concept and planning through execution and implementation, to fulfillment and conclusion, our firm has provided counsel for promotion and marketing legal issues since 1977.*

360 Lexington Avenue      6650 Gunpark Dr. #200  
New York, NY 10017      Boulder, CO 80301  
Tel: 212.986.8282      Tel: 303.581.0722  
Fax: 212.986.8332      Fax: 303.581.0732  
[www.promolaw.com](http://www.promolaw.com)

## GRANT & GRANT, LLP

Is Pleased to Announce that

### ALEX GOIRAN

and

### MARK SPRINGSTON

have joined the Firm.

Mr. Goiran represents individuals and businesses in a wide range of real estate transactions.  
Mr. Springston represents businesses and individuals in tax planning and compliance issues, as well as financial consulting issues.

Grant & Grant, LLP  
436 Coffman Street Ste. #200  
Longmont, CO 80501  
Tel: 303.776.3100 Fax 303.774.2349

## WELCOME AMY WADDLE

The Twentieth Judicial District has a new District Administrator! Bob Bernard left in November, 2001 to become the Deputy State Court Administrator for Planning and Analysis.

A national search has brought us Amy Waddle, formerly Judicial Branch Chief Information Technology Officer and implementation manager for the state of Kansas.

She is a graduate of the University of Kansas with a degree in political science. She also attended one year of law school, and received her masters' degree in judicial administration from the University of Denver College of Law in 1990.

Amy is just the bright, talented and hard-working person that Boulder needs. Her former boss told Judge Bailin that he always gave Amy the "unmanageable" and "impossible" tasks and she always got them done and done well. She is also skilled in management and favors a collaborative style that fits well with Boulder. The District believes that the bar will enjoy a good working relationship with Amy; she looks forward to working with the bar and its members as the need may arise.

# LAWYERS ANNOUNCEMENTS

THE BOULDER COUNTY BAR ASSOCIATION IS SEEKING NOMINATIONS AND/OR LETTERS OF INTEREST FOR POSITIONS ON THE BOARD OF DIRECTORS FOR 2002.

BOARD POSITIONS ARE FOR A THREE-YEAR TERM. THE POSITION OF SECRETARY/TREASURER IS ALSO AVAILABLE.

THIS POSITION ON THE EXECUTIVE BOARD MOVES TO PRESIDENT OF THE BOARD IN 2004-2005.

PLEASE CONTACT CHRISTINE AT THE BAR OFFICES WITH QUESTIONS REGARDING THE POSITIONS.

303.440.4758

NOMINATIONS AND LETTERS ARE DUE IN MARCH AND FINAL DECISIONS ARE MADE IN APRIL



## **MARK YOUR CALENDARS!!**

THE BOULDER COUNTY BAR ASSOCIATION ANNUAL MEETING / RECEPTION

WILL BE HELD AT

THE BOULDER MUSEUM OF CONTEMPORARY ART THURSDAY, JUNE 6

5-7 PM

COCKTAILS AND HORS D'OUVRES

DETAILS TO COME

\$15 PER PERSON

THE AWARD OF MERIT AND YOUNG LAWYER OF THE YEAR AWARD ARE PRESENTED AT THE ANNUAL MEETING.

PLEASE SEND YOUR NOMINATIONS TO THE BAR OFFICES.

## **NEW DOMESTIC RELATIONS CASE MANAGEMENT**

Effective March 1, 2002, the Boulder District Court will adopt new case management procedures to better serve families involved in domestic relations cases. The goal of these new procedures is to ensure that by the 91st day after the filing of a petition for dissolution of marriage or legal separation, there must either be a decree of dissolution entered or the case must be set for permanent orders.

In practice, counsel may file required documents at any point as they become available in non-contested cases, so that a case not involving children is ready for review and entry of Decree on the 91st day.

In non-contested cases involving children, documents should still be filed at least three weeks before the hearing to allow the magistrate or family court facilitator an opportunity to review the documents. In these cases, a non-contested hearing may be scheduled at the time of filing if the parties are petitioner and co-petitioner and they have completed all their documents when they appear to file the petition.

If a case reaches its 91st day and is neither finalized nor set for permanent orders, a dismissal notice will issue. Counsel are reminded that a support order should be provided to the court in all cases involving child support and/or spousal maintenance.

A case management order will be mailed to both parties in every case. It is anticipated that adoption of these procedures will minimize ongoing conflict for families whose cases can be resolved expeditiously and may also reduce the associated costs. Additionally, they will also help the 20th Judicial District comply with a Colorado Supreme Court directive which mandates that a decree of dissolution or separation enter within six months of filing. For additional information, you may contact Debbie Crosser, Clerk of Court, at 303.441.3766, or Magistrate Norma Sierra at 303.441.3742.

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**2002 Boulder County Bar Association  
Legal Membership Directory Update Form  
DEADLINE IS MARCH 22, 2002**

The BCBA will be updating the Membership Directory. If you would like to be listed, please complete the form below and return it via fax to (303) 402-6958 or via mail to the Bar office at 1942 Broadway, #205, Boulder, 80302. Anticipated publication date is April 2002.

Last Name \_\_\_\_\_ First Name \_\_\_\_\_ M.I. \_\_\_\_\_

Firm or Business Name \_\_\_\_\_

Please list us in the firm section: Yes \_\_\_\_\_ No \_\_\_\_\_

Address \_\_\_\_\_

Mailing Address \_\_\_\_\_

Phone \_\_\_\_\_ Fax \_\_\_\_\_ E mail \_\_\_\_\_

**SPECIALTY AREA LISTINGS**

If you would like to be listed in a specialty area of practice, the charge will be \$25 for EACH listing.  
Please use the list below when choosing where you would like to be listed in the Directory.

Accidents-Personal Injury/Property	Entertainment & the Arts	Ski Law
Administrative & Governmental	Environmental	Social Security
Agricultural-Ranch/Farm	Estate Planning - Wills, Trusts & Probate	Sports Law
Alternative Dispute Resolution	Finance	Taxation
Antitrust	General Practice	Traffic
Aviation	Immigration Law	Unemployment Compensation
Banking	Intellectual Properties	Water Law
Bankruptcy	International Trade & Business Law	Worker's Compensation
Civil Litigation	Juvenile Law	Zoning/City Planning - Land Use
Civil Rights	Labor Law	
Commercial Litigation	Landlord & Tenant	
Computer Law	Mental Health	
Constitutional	Natural Resources	
Construction Law	Product Liability	
Consumer	Radio & communication	
Corporation, Partnerships & Business	Real Estate	
Criminal Law	Real Estate Joint Ventures	
Divorce/Family Law	Real Estate Litigation	
Education Law	Registered Patent Attorneys	
Elder Law	School Law	
Employment Law	Securities	

1. \_\_\_\_\_ 2. \_\_\_\_\_ 3. \_\_\_\_\_

Please list me in the Directory in the above specialty areas. My check for \$ \_\_\_\_\_ is enclosed.

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# PRO BONO PAGE

Thank you to the following attorneys who accepted 31 referrals from BCLS during January.

**Steve Barnett**  
**Brent Bartlett**  
**Sara Bayko**  
**Bill Benjamin**  
**Kit Blakemore**  
**Susan Bryant**  
**Jerry Cross**  
**Kim Gent**  
**Katie Goff**  
**Brad Hall**  
**Chris Hawk**  
**Kurt Hofgard**  
**George Johnson**  
**Anne Jorgensen**  
**Thomas Moore**  
**Brad Peterson**  
**Mythily Ramachandran**  
**Larry Rider**  
**Peter Shelley**  
**Scott Tippet**  
**Louisa Young**  
**David Thrower**  
**Bill Zurinskas**

*Boulder County Legal Services pro se family clinic volunteers:*

**Mary Louise Edwards**  
**Ann Mygatt**  
**Bev Nelson**

**Patricia Roberts**  
**Wendy Stevens**  
**Georgiana Scott**

Thank you to **Peter Jarldane** for a generous donation after resolving his pro bono case!

**Boulder County AIDS Project**  
Thank you to the following attorneys who accepted pro bono referrals for the **Boulder County AIDS Project** during the month of January:

**Paul Bierbaum**  
**Lance Goff**  
**Steven Taffet**

**Pro Bono Corner** Colorado Legal Services has recently hired a Web Content Coordinator to coordinate the development of the statewide web site for Legal Services programs.

The goal is to have a web site that will serve several major audiences: low-income people who need legal assistance, legal services providers and advocates who serve them, community groups and court personnel who regularly encounter low-income people with legal needs, and pro bono lawyers and law students. The primary impact of a CLS web site will be

improved service to clients.

Please feel free to offer suggestions on content and let us know how you might use this site to serve your clients. Call Sue at 303-449-2197. I look forward to meeting and working with all of you to more efficiently serve CLS clients, staff and the community statewide.

- Molly French, Web Site Coordinator

**BCBA Professionalism  
Committee  
On-call Schedule**

March 4	Mark Langston	440-9684
March 11	Bev Nelson	554-7030
March 18	Christie Coates	443-8524
March 25	Steve Meyrich	440-8238

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## TRUSTS AND DIVISION *(continued from page 4)*

"will substitute" for a number of reasons. The mother's estate plan could just have easily been incorporated into a will. The law is clear that a child's interest in a future inheritance is a mere expectancy. Furthermore, the Restatement (Third) of Trusts provides that "with respect to the rights of creditors and other purposes of substance, the property of a revocable trust is treated as if it were owned by the settlor. . . and the other beneficiaries of the trust are treated as if they have no existing property interests so long as the power to revoke exists." See Comment b, Section 56 of Tentative Draft No. 2 of the Restatement (Third) of Trusts. This would be the logical conclusion.

An even greater question is how a future interest in a trust, such as the ones described above, is valued for purposes of dividing property upon divorce? In both *Balanson* and *Gorman*, other lifetime beneficiaries of the trusts were entitled to discretionary distributions of corpus from the trust, and in *Gorman*, the mother could revoke the trust and terminate the husband's interest at any time. This would appear to render valuing the interests nearly impossible. When is the interest in a revocable trust valued? The court in *Gorman* ruled that the appreciation in the value of the mother's revocable trust during her son's marriage was mari-

tal property subject to division. Under marital property law, an inheritance is treated as a spouse's separate property and not marital property. A revocable trust either terminates or becomes irrevocable upon the grantor's (the parent's) death, when the interest passes to the beneficiary. It would seem that the entire interest in the trust at the time of the parent's death, including any appreciation during the child's marriage, would fall under this definition.

Legislation has been introduced to overturn the rulings of *Balanson* and *Gorman*. (Senate Bill 02-160.) Until such legislation is passed, however, of what should we be advising our clients? It seems that the only "fail safe" way to ensure that the interest of a spouse in a trust cannot be considered in division of property upon divorce is for the spouses to enter into a marital agreement specifically referring to the trust and stating that it, along with all appreciation in the trust's value, is and will remain the separate property of the beneficiary spouse. This may be difficult for clients who have older children who are already married when they create the trust. It may be advisable for parents to provide that a child's share of their estate will pass to a lifetime trust for the child instead of vesting outright at any time. *Rosenblum* and *Jones* hold that this type of interests is not property and therefore cannot

be considered upon divorce. Language may also be added to a trust to address when a child's interest vests and what effect a divorce would have on the child's interest. Whether this would put the interest beyond the reach of a divorcing spouse is questionable. It also seems that, unless there are other reasons for establishing a revocable trust, such as the client owning out of state property, it may be advisable to recommend that clients incorporate their estate plans in a will instead of a revocable trust if they are concerned about protecting a child's interest. It will be interesting to see what developments occur in this area over the next few months.

*Shelly D. Merrit is a co-chair of the Tax, Estate Planning and Probate Section and a member of the Caplan and Earnest law firm.*

## FLASH IN THE PAN *(continued from page 5)*

by all members of the Athens Bar:

*It is axiomatic that a democracy cannot exist without an independent and fearless judiciary. The moment the decisions of our judges are colored or influenced by political considerations that moment free governments begin to totter and commonwealths begin to fail.*

*We further ask the privilege of commending you to the people of the circuit as a judge who has been fearless in your decisions - for your judicial acumen and for your honesty and steadfast loyalty to your own sense of duty and right.*

Horton eventually agreed to run for reelection and was soundly defeated by his opponent. That same day, prosecutor Thomas Knight was elected Lieutenant Governor.

In a second U.S. Supreme Court decision, *Norris v. Alabama* (294 U.S. 587 (1935)), the Supreme Court unanimously held that the Alabama system of jury selection was unconstitutional

and reversed the convictions of the Scottsboro Boys. In 1937 the state dropped charges against four of the boys, and between 1943 and 1950, others were pardoned. In 1936 an Alabama jury, in yet another retrial, convicted Haywood Patterson. He eventually escaped from prison.

So what happened to Horton? He bought a farm and finished his life as a farmer, dying at the age of 95.

Too often we take for granted what judges do. Often they are asked to make very difficult decisions that affect people's lives. They are asked to make custody rulings, which, though seemingly inconsequential to many of us, can affect the lives of an entire family. They may even be asked to decide whether a person should be given the death penalty, sometimes without the benefit of having been the trial judge. We expect a lot from them even though most of us would

not want to step into their shoes. We may disagree with their decisions, but we should give them credit for making a positive difference in the administration of justice. Let's not consider them mere flashes in the pan.

*Jerry Retherford, President of the El Paso County Bar Association, wrote this column for the El Paso County Bar Newsletter. He makes notable points about the law, judging and courage, reminding us of how fortunate we are in Colorado not to select our judges by election. Mr. Retherford graciously agreed to let us reprint his article in our newsletter.*

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## VALIDITY OF CONTRACT *(continued from page 3)*

type of requirement is unenforceable. Nevertheless, the Supreme Court's comment suggests that it might have found the provision unconscionable if it had unambiguously deprived the employee of commissions.

The Supreme Court also stated that a party will not be permitted to take advantage of his own independent act to work a forfeiture of his own contract. It then said that it was appropriate to note that the contract had been terminated by the employer, not the employee. The implication is that the court would not have allowed the employer to take advantage of his own act of terminating his employee to work a forfeiture of amounts owed to the employee under the contract.

In light of the strong language of *Hofer* and *Moorman*, it is difficult to reconcile the holding in *Barnes v. Van Schaack* (Colo. 1990). In *Barnes*, the agreement stated that "Should Mr. Barnes terminate his employment" he would not receive any commissions on loans closed subsequent to the month of his termination. The trial court found that the language was ambiguous but also ruled that forfeiture of the right to earned and unpaid compensation violated C.R.S. § 8-4-125 of the Wage Claim Act, which voids purported waivers or modifications of rights under the Act.

The Court of Appeals, however, found no violation of § 8-4-125, stating that the terms of the agreement meant that the employee had not earned any commissions on loans closed after the month of termination. The court then found the language unambiguous and enforced it against the employee.

The issue of unconscionability is not discussed in *Barnes*, suggesting that the employee resigned. The wording of the clause in question further suggests that it was *Barnes*, rather than his employer, who terminated the employment. If it is the employer who causes the forfeiture by firing without cause, the language of *Hofer* and *Moorman* suggests that a provision requiring employment at the time of closing would be found unconscionable. According to *Hofer*, it would be "patently unjust" if employees could be deprived of commissions by termination prior to closing. The question is whether contract language providing for this type of forfeiture makes a difference.

One other avenue to explore relates to the implied covenant of good faith and fair dealing. The Alaska Supreme Court has discussed Restatement of Contracts (Second) § 230 in the context of an agreement conditioning payment of a bonus on employment. Section 230 states that the obligor's duty is not discharged if the occurrence that causes the discharge results from a breach by the obligor of his duty of good faith and fair dealing. The description of this duty varies by jurisdiction. In Delaware, it requires a party to refrain from arbitrary and unreasonable conduct that has the effect of preventing the other party from receiving the fruits of the contract. In New York the duty is breached when one party makes an effort to subvert the contract itself, depriving the other party of the benefit of its bargain. In Massachusetts, the duty is breached when the employee is discharged in bad faith to deprive him of past or earned compensation.

The Colorado Supreme Court has held that there is an implied covenant of good faith and fair dealing in every contract. However, three earlier Court of Appeals decisions declined to

recognize the existence of this implied covenant in the context of otherwise at-will employment. Recently the Supreme Court elected not to express an opinion on this issue.

The Court of Appeals cases all relate to attempts to assert breach of the implied covenant as an independent tort claim or as a basis for a claim for wrongful discharge. Therefore, it could be argued that those decisions only reject the assertion of tort claims based on the covenant. Restatement § 230, on the other hand, relates to claims for breach of contract.

In light of this distinction and the lack of a Supreme Court decision on the issue, there may be room for argument that an employer should not be permitted to take advantage of a requirement of employment at the time of closing to fire an employee in bad faith to avoid payment of commissions.

*Joel Maguire is a co-chair of the Employment Law Section and a member of the Martin & Mehaffy law firm.*

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