

Chapter 23

DEATH AND DIVORCE

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§ 23.1 • INTRODUCTION

Death planning should be addressed in all dissolution matters. The death of a party to a dissolution of marriage action can profoundly affect the distribution of assets whether it occurs during the dissolution process or afterwards. This chapter addresses some of the common ways that death can affect divorcing or divorced parties and how parties can plan for death in their separation agreements.

§ 23.2 • DEATH DURING DIVORCE

Attorneys handling dissolution of marriage actions should not overlook the fact that parties can die during the dissolution of marriage process. Many parties do not know about or do not think about the ramifications of their death during divorce. They might be surprised to know, for instance, that if they die during divorce, in many instances their soon-to-be ex-spouse will inherit all of their property.

Some parties are not concerned about this possibility, and some parties are very concerned. Regardless, all divorcing parties should be given the information to make an informed decision as to whether or not they wish to do some divorce-specific estate planning. The depth of the information can be calibrated to the size and complexity of the client's estate, as well as the client's particular circumstances. Attorneys working with divorcing clients should know what their clients' estate plans are or whether their clients have estate planning in place at all.

§ 23.2.1—Dying Intestate

If a party dies during the divorce proceeding and he or she does not have a will, the party will have died intestate. If the party dies intestate with no living descendants or parents, the surviving spouse will inherit the deceased client's entire estate.¹ If all of the party's surviving descendants are also descendants of the surviving spouse, and there are no other descendants of the surviving spouse who survive the decedent, the surviving spouse receives the entire estate.² If the party died with no descendants, but with at least one surviving parent, the surviving spouse will receive the first \$200,000 of the intestate estate, as well as three-fourths of any balance.³ If all of the party's surviving descendants are also descendants of the surviving spouse, and the surviving spouse has descendants who are not descendants of the decedent, the surviving spouse receives the first \$150,000 of the estate and one-half of any balance.⁴ If one or more of the decedent's descendants are not descendants of the surviving spouse, and all of the decedent's descendants are adults, then the surviving spouse receives the first \$100,000 of the estate and one-half of any balance.⁵ Finally, if one or more of decedent's surviving descendants are not descendants of the surviving spouse, and one or more are minors, then the surviving spouse will receive one-half of the intestate estate.⁶

In sum, if a person dies intestate, the surviving spouse will receive what is, for many people, the majority of the estate. This state of affairs is usually quite objectionable to parties with children of a prior relationship or marriage. Therefore, communicate to clients the importance of doing estate planning to protect the client's interests during the pendency of a divorce action.

§ 23.2.2—Disinheriting A Spouse

Parties may wish to modify their wills during the divorce process in order to specifically make no gifts to their divorcing spouse. Parties need to know, however, that a disinherited spouse is entitled to make a claim for an elective share of a deceased spouse's estate regardless of what the will provides. Colorado law protects spouses from disinheritance if there is no valid pre- or post-marital agreement waiving the elective share and other rights of a surviving spouse. A surviving spouse will receive a larger portion of the decedent's estate the longer the couple has been married.

A surviving spouse has the right to claim an elective share amount not greater than 50 percent of the decedent's net augmented estate.⁷ However, based upon the number of years the couple has been married, the percent claimable may be significantly less than 50 percent.

The elective share schedule is as follows:

<u>Years of Marriage</u>	<u>Elective Share Percentage</u>
Less than 1 year	Supplemental amount only
> 1 year but < 2 years	5% of the augmented estate
> 2 years but < 3 years	10% of the augmented estate
> 3 years but < 4 years	15% of the augmented estate
> 4 years but < 5 years	20% of the augmented estate
> 5 years but < 6 years	25% of the augmented estate
> 6 years but < 7 years	30% of the augmented estate
> 7 years but < 8 years	35% of the augmented estate
> 8 years but < 9 years	40% of the augmented estate
> 9 years but < 10 years	45% of the augmented estate
10 years or more	50% of the augmented estate ⁸

A surviving spouse who elects against a will and claims his or her elective share will receive an elective share of the "net augmented estate." Calculating the augmented estate is somewhat complex and beyond the scope of this chapter. In general, however, to figure the augmented estate,⁹ first determine the fair market value of the decedent's probate estate at the time of death. This calculation will include life insurance and other benefits that are paid to the estate. Then subtract funeral expenses, family allowance, exempt property, administration expenses, and enforceable claims. This will yield the net probate estate.

Next, add up all non-probate transfers to others not the spouse or the estate. These transfers include property over which the decedent had only general power of appointment; the decedent's fractional interest in joint tenancy personal property; the decedent's fractional interest in joint tenancy real property; the decedent's interest in multiple party accounts; proceeds of life insurance if the decedent owned the policy or had the right to designate the beneficiary, but only if proceeds are paid to the estate or the spouse; transfers by the decedent during marriage, if the decedent retained the right to income; transfers by the decedent during marriage, if the decedent retained the power to benefit himself or herself; transfers by the decedent during marriage and within two years of death because of termination of right over general power of appointment property; joint tenancy interest or multiple party accounts; transfers by the decedent during marriage and within two years of death of life insurance policies, but only if paid to the estate or the spouse; and gifts by the decedent during the marriage and within two years of death to the extent they exceed \$10,000 to any one person in any one year. This ensures that the deceased spouse cannot simply transfer all assets from the estate to others on his or her deathbed, to the exclusion of the spouse.

In calculating non-probate transfers, one does not count transfers for full value, transfers consented to by the spouse, life insurance payable to others and required to be carried out by court order, qualified retirement plans payable to others, life insurance and retirement plan benefits (but not IRAs) payable to someone other than the spouse or estate, joint tenancies in real estate created before the marriage, or joint tenancy in real estate created by a third party during the marriage.

Next, add up all non-probate transfers to the spouse, including the decedent's fractional interest in joint property passing to the spouse, if not calculated elsewhere, and the decedent's multiple party accounts passing to the spouse, if not calculated elsewhere. Social security benefits are specifically excluded.

Next, add up all of the spouse's property, if not included or excluded from previous calculations, such as property titled in the spouse's name; the spouse's fractional interest in joint tenancy personal property; the spouse's fractional interest in joint tenancy real property; the spouse's interest in multiple-party accounts; property that passed to the spouse at the decedent's death; the spouse's non-probate transfers to others, as if the spouse had been the decedent; less enforceable claims against the spouse.

The net augmented estate is the sum of all of these various property interests. The elective share is the percentage of the net augmented estate that the disinherited spouse may claim.

The elective share can be satisfied with property passing to the spouse by will or intestacy and non-probate transfers to the spouse. The remainder, if any, is to be satisfied by an equitable apportionment of the assets in the probate estate and non-probate transfers to others.¹⁰

A surviving spouse must make an election against the estate no later than nine months after the decedent's death or six months after the will has been admitted to probate, whichever deadline expires later.¹¹

In addition to the elective share,¹² by operation of statute, a surviving spouse has the right to claim up to \$50,000 of the deceased spouse's estate, even if he or she is left out of the will. A surviving spouse can claim the family allowance and receive up to \$24,000 without court approval,¹³ and can claim exempt property, which can be cash, in the amount of \$26,000.¹⁴ The family allowance and exempt property are paid to the spouse before general creditors and before specific and general devises in the will are satisfied.¹⁵

Parties need to understand, therefore, that there are limits to how much they can protect their estate from a divorcing spouse in the event that they die during a divorce. Some clients may attempt to simply reduce their probate estate through non-probate transfers of property either during life or at death. Parties should be informed that such non-probate transfers, in most cases, will be counted back into the net augmented estate if they were made less than two years before death.¹⁶

§ 23.2.3—Considerations If One Party May Die During Divorce

If there is a reasonable possibility that a party to a divorce may die before the divorce proceedings are concluded, clients should be informed that whether a party dies before or after a divorce may have a significant impact on what property that party has to bequeath his or her heirs. This is especially true of larger estates.

The difference divorce makes

When a person divorces, he or she is entitled to an equitable share of the marital estate.¹⁷ The definition of the marital estate has nothing to do with how property is titled as between spouses.¹⁸

On the other hand, a spouse is entitled to bequeath his or her property — that is, property that is titled to him or her, or property in which he or she has a property interest — to whomever he or she wishes. By and large, titling is very important in determining what can be validly devised.

If a surviving spouse is left out of the deceased spouse's will and subsequently elects against that will, the elective share will be calculated after valuing the decedent's property, joint property, the surviving spouse's property, and non-probate transfers made by both parties.¹⁹ Thus, marital and non-marital property is used in the calculation of what the surviving spouse can collect.

In other words, there can be very different bundles of property that are used in calculating an equitable share of a marital estate versus the augmented estate. Thus, it can make a significant difference whether a party receives an equitable share of a marital estate or an elective share of an augmented estate. A simplistic example of this follows.

Husband and Wife have been married for five years. Wife is a commercial real estate developer. She has an estate worth \$2,890,000, most of which is kept in a brokerage account in her name only. The full value of the brokerage account was accumulated during the marriage, and therefore is deemed marital property. Husband has no estate of his own, as he has a gambling addiction. Wife is diagnosed with brain cancer. Husband files for divorce.

Wishing to leave all of her assets to her son from a prior marriage, Wife executes a will that gives all of her assets to her son.

Wife is entitled to bequeath property titled in her name to whomever she wishes. If Wife dies before a divorce decree is issued, Wife can leave her full \$2,890,000 to her son. If Husband does not elect against the will, Wife's son will inherit this money.

If Husband and Wife divorce before Wife dies, most likely Husband is going to receive \$1,445,000 as his 50 percent share of marital property. Wife will have \$1,445,000 to bequeath to her son.

If no decree of dissolution of marriage is entered before Wife dies, and Husband claims his elective share of the augmented estate, Husband will receive 25 percent of the estate, or \$722,500, plus the family allowance and exempt property, and Wife's son will receive the remainder.

In other words, Husband can get twice as much of Wife's money if the dissolution of marriage is complete before Wife passes away.

Of course, the facts could be different. A party might receive significantly more of the couple's assets if the moneyed party passes away before the decree of dissolution is issued. This could be the case if the marriage were a long-term one and most of the assets of the moneyed party came from an inheritance.

What to do if a divorcing party is likely to die during the divorce

Should one of the parties to a dissolution of marriage action die before the decree of dissolution of marriage is issued, the trial court will lose jurisdiction of the matter, and the case must be dismissed.²⁰ However, if a decree of dissolution of marriage was issued before the death, the trial court does not lose jurisdiction over the matter, unless there is an appeal of the order for the issuance of the decree based upon the allegation that the trial court erred in finding that the marriage was irretrievably broken.²¹ Appellate courts do not lose jurisdiction of a matter as the result of the death of a party if a decree of dissolution was entered.²²

If a party is likely to die during the pendency of a dissolution of marriage action, a party may request a preferential hearing date.²³ The trial court shall grant the request if there is clear and convincing medical evidence that a party suffers from an illness or condition that places survival for more than one year in substantial doubt. If one party is over 70 years old, the trial court may also grant the request. If the motion is granted, the trial court shall set a trial date no more than 120 days from the date of the filing of the motion.

A party may also request that the trial court bifurcate the permanent orders hearing, such that a decree of dissolution is issued before the permanent orders.²⁴ This way, even if a party dies before permanent orders are issued, the trial court still has jurisdiction to hear permanent orders because the decree was entered. The trial court may bifurcate permanent orders from the issuance of a decree upon a finding that doing so is necessary in the best interests of the parties. However, bifurcation should only be considered by the trial court in exceptional cases.²⁵

When a client dies

If a client dies during the pendency of a dissolution of marriage matter, counsel for the deceased client must notify the trial court of the death by submitting a "Suggestion of Death" and a copy of the death certificate to the court pursuant to C.R.C.P. Rule 25. If the action does not abate as a result of the death, the surviving party may move to have the personal representative of the decedent's estate substituted as a party. Service must be made upon the personal representative pursuant to C.R.C.P. Rule 4. The motion must be made within 90 days after service of the suggestion of death, or the matter will be dismissed.

§ 23.2.4—Other Types Of Planning

Parties should also review that part of their estate planning that deals with the appointment of fiduciaries when they are divorcing. This is because a spouse, even a divorcing spouse, will have priority to be appointed a guardian and/or conservator of an incapacitated person if the spouse is nominated in the will, or if there is no will.²⁶

A guardian is the fiduciary appointed by a court to take care of an incapacitated person. A conservator is the fiduciary appointed by a court to manage the finances of an incapacitated person.

In order to prevent a divorcing spouse from being appointed a guardian or conservator, it is wisest to execute a nomination of an alternative person to fill that duty should the need arise.

Likewise, if a person needs someone to make medical decisions on his or her behalf, doctors are going to look toward a spouse, even a divorcing spouse, to make those decisions.²⁷ A divorcing client should be counseled to execute a medical durable power of attorney that nominates another to make such decisions, and the durable medical durable power of attorney should be given to the client's primary physician. The medical durable power of attorney should be coordinated with the client's living will, if any.

§ 23.3 • DEATH AFTER DIVORCE**§ 23.3.1—Dissolution Of Marriage Obligations**

Unless otherwise agreed in writing or expressly provided in the permanent orders, a child support obligation does not automatically terminate upon the death of the obligor parent.²⁸ The personal representative of the estate of the deceased obligor parent must file a motion for child support to be modified, revoked, or commuted to a lump-sum payment if relief from the obligation is sought.²⁹

A maintenance obligation does terminate automatically upon the death of either party, unless otherwise provided in writing or in the permanent orders.³⁰ However, where maintenance has been secured by life insurance, maintenance is due even after the death of the obligor.³¹ Further, when parties agree to contractual maintenance, if the separation agreement is silent as to whether maintenance continues after the death of the obligor, the separation agreement may be read to mean that maintenance does not terminate at death of the obligor.³²

§ 23.3.2—Claims Against Estates

If a divorced party dies owing money as the result of a divorce action, the obligee can make a claim against the deceased party's estate.

Many claims against a decedent will survive the decedent's death.³³ This includes child support obligations, past and future;³⁴ past-due maintenance obligations;³⁵ and possibly future

maintenance obligations.³⁶ Further, an obligee has a claim against the decedent's estate if the decedent did not make all property distributions or debt payments required by permanent orders.

Upon the death of an obligor, known creditors should receive from the personal representative of the estate a notice of death and a notice of the time limits for filing claims against the estate.³⁷ If the creditors are not known, they are given notice of the death and the time limits for claims against the estate by publication.³⁸

A creditor's claim against an estate must be presented to the personal representative or filed with the court within the applicable time period,³⁹ or it will be strictly barred. The claim need only state, in writing, the amount of claim, the basis of claim and the name and address of the claimant. No specific form is necessary, although CPC Form 22 is advisable to use, especially if the claim will be filed with the court.⁴⁰

Claims arising before death are barred four months from the date of the first publication of notice to unknown creditors or 60 days after notice is mailed or delivered directly to a known creditor.⁴¹ If no notice at all was given, claims are barred one year after date of death.⁴² Claims that are made after these deadlines are barred by the probate non-claim statute. A personal representative will not have the authority to pay a claim against the estate, even if valid, if the claim is not presented within the required time frame.⁴³ Further, the court will lose jurisdiction over the claim.⁴⁴

If no probate has been opened, a claimant may open a probate, file a claim directly with the court, and request to be appointed the personal representative of the estate, or ask that a special or public administrator be appointed.⁴⁵

Once a personal representative receives a timely notice of claim, the personal representative can either allow it or disallow it.⁴⁶ If the claim is disallowed, the creditor has 60 days to petition the court for allowance of the claim. If the personal representative neither allows or disallows the claim within 60 days, the claim is deemed allowed.

If the claim is allowed, the personal representative pays the claim in its order of statutory priority. Even if the claim is allowed, if there are not enough assets to pay all claims, the claim may not get paid if its priority is too low. The following is the priority of claims:⁴⁷

- 1) Property held by the decedent as a fiduciary or trustee of a trust, including a resulting trust;
- 2) Costs and expenses of administration of estate;
- 3) Funeral and burial, interment, or cremation expenses;
- 4) Family allowance/exempt property;
- 5) Debts and taxes with preference under federal law;
- 6) Last illness medical and hospital expenses;
- 7) Debts and taxes with preference under state law;
- 8) Claim of department of health care policy and financing;
- 9) All other claims.

Most claims arising as the result of a dissolution of marriage matter will be paid last, with all other claims. Past-due child support and maintenance obligations, which are judgments when due, will not have any greater priority than future child support payments, unless these judgments have been recorded as liens against real property. Past-due child support and maintenance cannot be disallowed by the personal representative, because they are judgments.⁴⁸

If a decedent has not transferred property awarded to the surviving ex-spouse at the time of death, that property is best categorized as property held in trust by the decedent, and therefore should be distributed to the claimant before all other claimants.

If the ex-spouse has a lien on a property, such as a deed of trust securing a promissory note, the ex-spouse does not need to file a claim against the estate. The non-claim statute will not apply to such secured debts.⁴⁹ However, liens cannot be executed upon until one year after death,⁵⁰ and no execution of judgments may issue upon nor may any levy be made against property of an estate.⁵¹

Ex-spouse creditors should keep in mind that their claims against a decedent's estate will be paid after the family allowance and exempt property have been calculated. Together, those amounts can equal up to \$50,000. For many estates, this amount is greater than the value of the estate after expenses of administration, burial expenses, last illness expenses, and taxes have been paid.

§ 23.3.3—Revocation Statutes

The issuance of a divorce decree works to automatically revoke probate and non-probate transfers between divorced spouses. This provides a safety net for those parties who forget to remove their ex-spouse from their estate planning documents, or forget to change beneficiary designations. A divorce decree will automatically revoke the following:

- 1) A revocable disposition or appointment of property made by a divorced person to a former spouse, or the former spouse's relatives (such as a gift made in a will, revocable trust, life insurance beneficiary designation, or pay on death designation);
- 2) Any revocable power of appointment given to former spouse or former spouse's relative;
- 3) Any revocable nomination of former spouse or former spouse's relative as a fiduciary or representative (such as guardian, conservator, or personal representative for the decedent);
- 4) Joint tenancies with right of survivorship and transform them to tenancies in common.⁵²

The revocation statute is retroactive, and therefore applies to parties who divorced before the statute was promulgated.⁵³

Payors of benefits are not liable for payments to a designated beneficiary who turns out to be an ex-spouse unless the payor had notice of the dissolution of the marriage.⁵⁴ For instance,

if the decedent forgot to remove her ex-husband as the beneficiary of her life insurance, the life insurance carrier will pay the ex-husband the life insurance benefits. Once the ex-husband has the benefits, the life insurance company is not liable to the heirs of the decedent for wrongly paying the ex-husband, unless the life insurance company had notice of the divorce. The decedent's heirs will have to collect the life insurance proceeds from the ex-husband, who will be under a statutory obligation to return the proceeds.⁵⁵

It is also important to know that payors of ERISA-covered benefits will *only* pay survivor benefits to the designated beneficiary.⁵⁶ Because federal ERISA law preempts state law, if that beneficiary is the ex-spouse, then the decedent's estate's only remedy is to collect the benefits from the ex-spouse.⁵⁷ The ex-spouse will be under a statutory obligation to return the proceeds.⁵⁸

In determining who takes PERA co-beneficiary or survivor benefits, PERA plan administrators will follow PERA statutes at C.R.S. § 24-51-101 *et seq.* and not the revocation statute. However, the possibility that an ex-spouse will errantly receive PERA benefits is fairly slight as a result of PERA rules. For instance, before a PERA member retires, he or she may designate a beneficiary of survivor benefits.⁵⁹ However, the designated beneficiary is eligible for the benefits only if the deceased PERA member has no spouse or children.⁶⁰ After a PERA member retires, he or she may elect to designate a co-beneficiary of retirement benefits under some retirement benefits options.⁶¹ The beneficiary will be receiving current benefits, and therefore the chances are strong that the parties will address the benefits at the time of the dissolution. It is important to note that PERA will only modify a co-beneficiary designation under court order if modification is desired more than 60 days after the initial designation of a co-beneficiary.⁶²

With respect to military pensions, at the time of a divorce, the ex-spouse is automatically terminated as the beneficiary of survivor benefits.⁶³ In order for an ex-spouse to receive survivor benefits, there must be an election.

An ex-spouse may not make a claim for an intestate share of the estate of the decedent ex-spouse. An ex-spouse may not claim an elective share of the estate of a decedent ex-spouse or the family allowance.

§ 23.4 • PLANNING FOR DEATH IN THE SEPARATION AGREEMENT

§ 23.4.1—Life Insurance As Security

Divorcing couples often have a number of financial ties to each other after the divorce, such as child support, maintenance, or debt payment. Often times, the obligee spouse is financially dependent upon such payments. In order to protect the obligee spouse in the event of the death of the obligor spouse, the obligee spouse should use life insurance to secure payments and build this arrangement into any separation agreement.

The appellate courts have specifically authorized trial courts to order child support and maintenance payments to be secured by a life insurance policy on the obligor spouse's life.⁶⁴ Pension and retirement benefits should also be secured by life insurance if there are no or inadequate survivor benefits available. Debt payment, if significant, may also be secured with life insurance.

Often times, when life insurance is used as security for a financial obligation, the court will order that the obligor spouse obtain life insurance on his or her life, keep it current, and name the obligee spouse as the sole beneficiary. This creates a problem of enforcement. The obligee spouse is not able to easily determine whether the policy is kept current, is of the correct face value, or lists the correct beneficiary. Further, if the obligor spouse lets the policy lapse, it may be impossible for health reasons to obtain a new policy on the obligor spouse for a reasonable premium.

It is best therefore to obtain agreements or court orders that allow the obligee spouse to own the life insurance policy on the obligor spouse's life, and to pay for that policy. In some cases, parties may already have life insurance on the life of the obligor, and ownership of an existing policy may be transferred to the obligee. Premium amounts can be added into maintenance or even into a child support calculation. The policy should be purchased before the dissolution is final.

If there is no current policy on the life of the obligor, any separation or permanent orders should include the provision that the obligor spouse will submit to a physical examination and will submit all paperwork requested by the underwriter.

§ 23.4.2—Guardianships And Conservatorships For Children

In some particularly fractured families, custodial parents will be very concerned about what happens to minor children in the event of their death. These parents will ask how to keep the child from being placed with the surviving parent if they die during the child's minority.

In the absence of a dependency and neglect situation, legal parents will nearly always be entitled to the care and control of their children, above all others, in the case of the death of the other parent.⁶⁵ Legal parents have a constitutional right to the care and control of their children.⁶⁶ Even if a custodial parent nominates a non-parent as the guardian of a minor child, if the surviving parent wishes to become the custodian of the child, he or she most likely will be, depending upon the age and wishes of the child.⁶⁷

However, there are exceptions. For instance, where a legal parent had been convicted of incest, the court was found to have properly appointed the step-parent as the guardian of a child.⁶⁸ A trial court has also been upheld in appointing a non-parent temporary guardian for a minor child against the objection of a legal parent where the child and the parent were significantly at odds with each other, and the legal parent appeared to be embezzling the minor child's money.⁶⁹

It should be noted that in guardianship matters, the probate court (if the matter is in Denver) has jurisdiction. The probate court may apply Uniform Dissolution of Marriage Act statutes, *i.e.*, the best interests of the child standard, to a probate matter.⁷⁰

If one parent is already deceased, the surviving parent should nominate a guardian for a minor child. The appointment should be made in a will or other document that is in writing, signed by the parent, and witnessed by two people.⁷¹ If a guardian must be appointed for the child, the court will look first to a person nominated by the minor child, if the child is 12 years or older, then to the person nominated by a will or written instrument, and then to any other interested person.⁷²

Divorcing parents may wish to agree to the nomination of a guardian for the minor child in their separation agreement. However, if either parent changes the nomination in a subsequent writing, such as a will, most likely the subsequent writing will take precedence regardless of the prior agreement.

Conservatorships are different. A conservator is appointed by the court to manage the financial affairs of a minor child. A conservatorship will be set up if a deceased parent directly bequeathed assets to a minor child valued at more than about \$10,000. The conservator will, then, manage the deceased parent's gift to the minor child. Many times, a parent will strongly object to the surviving parent having control over the money the deceased parent leaves to his or her minor child.

A legal parent has no constitutional right to serve as a conservator for his or her minor child. When appointing a conservator for a minor child, a court will look first to a conservator or guardian appointed in another jurisdiction, then to the nominee of the minor child if he or she is over the age of 12, then to a parent or person nominated by the will of a deceased parent, and finally to an adult with whom the child resided for six months or more.⁷³

The court may pass over a person with priority for good cause.⁷⁴ If a parent nominates someone other than the other parent as a conservator, the nomination instrument should include the reasoning behind not nominating the other parent.

Conservatorships terminate when the minor child is 21 years old.⁷⁵

§ 23.4.3—Preserving Assets For Children

In some dissolution cases, divorcing parents are concerned about preserving marital assets for their children, especially in the event that one or both parents die. Sometimes, parents wish to set aside marital funds for their children in such a manner that neither parent can invade or dissipate the asset.

The easiest means of ensuring that a child participates in a parent's estate is for the parent to have life insurance on his or her life naming the child as the beneficiary. For divorcing parents, there are two main difficulties with this method of wealth transfer. First, if the parent dies during

the child's minority, a conservator will be appointed to manage the insurance proceeds on behalf of the child. Often, that person will be the child's surviving parent, which may not be acceptable to the other parent.

Second, divorcing parents often do not trust each other to purchase and keep current a life insurance policy benefiting the child. Parents complain that they cannot readily determine if the child remains the sole beneficiary on the policy or if the policy remains in place. Enforcement of oversight provisions in a separation agreement can be extremely difficult and costly.

Another means of preserving a portion of the marital estate for children is to transfer assets into custodial accounts. Custodial accounts are titled to the minor child and managed by one of the parents.⁷⁶ Such accounts are governed by the Colorado Transfers to Minors Act.⁷⁷ Funds put into such accounts are irrevocable.⁷⁸ Income from the account will be taxed to the child, at the child's rate, if the child is over 14 years of age or if the child is under 14 years of age and the income is less than \$1,400 for the year.

A custodial account can only be held for the benefit of one child.⁷⁹ The custodial account terminates when the child reaches the age of 21.⁸⁰

The difficulty of using a custodial account as an effective way for parents to preserve assets for their children is that the accounts can only have one custodian.⁸¹ Additionally, the custodian of the account can use the funds in the account, so long as such funds are used for the child. However, there is no court oversight as to whether the funds are being used appropriately.⁸² Divorcing parents, not usually known for their trust in each other, often have difficulty agreeing to put money into an account that the other parent is able to invade. Further, there is no built-in means of oversight, and therefore parents will have to fashion their own methods of oversight, such as requirements for yearly accountings, if that is an issue.

Parents can also agree to put part of the marital estate into a Section 529 Plan for their child. These are state-managed investment portfolios that are used for college expenses.⁸³ Earnings on the investments in a Section 529 Plan are income tax free.⁸⁴ Distributions from the plans that are used by the beneficiary for educational purposes are not included in the beneficiary's gross income.⁸⁵ When money is withdrawn from the plan, any gains on the investments are taxed to the beneficiary as ordinary income, rather than to the donor parent as capital gains.⁸⁶ Gifts can be made to the plan by any person, and such gifts qualify for individuals' \$11,000 annual gift exclusion. Money from the plan can be used at accredited in-state and out-of-state public and private colleges and universities.⁸⁷

The biggest drawbacks to preserving money for children with this vehicle is that the accounts within the plans are not self-directed. Rather, individual states set up such plans and manage them.⁸⁸ Further, if the child makes withdrawals for non-higher-education purposes, then a penalty is triggered.⁸⁹

The most flexible tool for preserving a portion of the marital estate for minor children is an irrevocable trust. Both parents can be co-trustees of the trust, ensuring that all decisions regarding trust assets are made by both parents and not unilaterally. Alternatively, parents can appoint a third party to be a trustee. Parents can appoint successor co-trustees in the event of their death. Distributions to the child can be made in any manner authorized by the trust instrument, such as during minority for specific purposes or at any age of majority, for specific purposes or as outright distributions. Irrevocable trusts, however, can be somewhat difficult and expensive to manage.

Finally, parents can contract to will, meaning that parents can enter into a contract whereby they agree to put certain beneficial provisions in their will, such as the devise of a certain asset or portion of an estate to a child. Such contracts must be for consideration. The problem with a contract to will is that a breach will only be determined upon the death of one of the parents. At that point, the surviving parent would have to sue the personal representative of the estate on a breach of contract action. Recovery of damages would be uncertain simply because of the nature of all litigation, and because there is no guarantee an estate could even satisfy a judgment against the decedent. Further, the reported cases in Colorado dealing with contracts to will are somewhat inconsistent, therefore adding to the uncertainty of the outcome of litigation.

NOTES

1. C.R.S. § 15-11-102(1)(a).
2. C.R.S. § 15-11-102(1)(b).
3. C.R.S. § 15-11-102(2).
4. C.R.S. § 15-11-102(3).
5. C.R.S. § 15-11-102(4).
6. C.R.S. § 15-11-102(5).
7. C.R.S. § 15-11-201.
8. *Id.*
9. C.R.S. § 15-11-202.
10. C.R.S. § 15-11-203.
11. C.R.S. § 15-11-205.
12. C.R.S. § 15-11-201(3).
13. C.R.S. § 15-11-405.
14. C.R.S. § 15-11-403.
15. C.R.S. § 15-11-403, 404.
16. C.R.S. § 15-11-202.
17. C.R.S. § 14-10-113.
18. *Id.*
19. C.R.S. § 15-11-202.
20. *Estate of Burford*, 935 P.2d 943 (Colo. 1997).
21. *Id.*
22. *In re Marriage of Sjerven*, 820 P.2d 1198 (Colo. App. 1991).
23. C.R.S. § 13-1-129.
24. C.R.S. § 14-10-106(1)(b).
25. *Estate of Burford*, supra n. 20.

26. C.R.S. § 15-14-310, 413.
27. C.R.S. § 15-18.5-103.
28. C.R.S. § 14-10-122(3).
29. *Id.*
30. C.R.S. § 14-10-122(2).
31. *In re Marriage of Graff*, 904 P.2d 402 (Colo. App. 1994).
32. *See In re Marriage of Parsons*, 30 P.2d 868 (Colo. App. 2001) (where a separation agreement is contractual and nonmodifiable by its terms, and the separation agreement did not state that maintenance terminates at remarriage, and did not state that maintenance was to continue even if obligee remarried, maintenance does not terminate upon remarriage. The presence of a nonmodification clause is sufficient to overcome the statutory presumption that maintenance terminates upon the recipient's remarriage.)
33. C.R.S. § 13-20-101(1).
34. C.R.S. § 14-10-122(1)(c) and (3).
35. C.R.S. § 14-10-122(1)(c) and (2).
36. *Graff*, *supra* n. 31; *see also Parsons*, *supra* n. 32.
37. C.R.S. § 15-12-801.
38. *Id.*
39. C.R.S. § 15-12-803(1).
40. C.R.S. § 15-12-804(1).
41. C.R.S. § 15-12-801, 803(1)(a).
42. *Id.*
43. *Crowley v. Farmers State Bank*, 123 P.2d 407 (Colo. 1942).
44. *Estate of Musselman*, 784 P.2d 58 (Colo. App. 1989). *But see De Avila v. Estate of DeHerrera*, 32 Colo. Law. No. 5, p. 160 (Colo. App. 2003) (holding that C.R.S. § 15-12-803 is not an absolute bar to late claims. This opinion has been widely criticized, and the practitioner should check the status of the holding before citing the case.).
45. C.R.S. §§ 15-12-203, 15-12-614, 15-12-804(1).
46. C.R.S. § 15-12-806(1).
47. C.R.S. §§ 15-12-805, 15-11-403, 15-11-404.
48. C.R.S. § 15-12-806(3).
49. C.R.S. § 15-12-803(3)(a).
50. C.R.S. § 13-58-102.
51. C.R.S. § 15-12-812.
52. C.R.S. § 15-11-804.
53. *In re Estate of Dewitt*, 54 P.3d 849 (Colo. 2002).
54. C.R.S. § 15-11-804(7).
55. C.R.S. § 15-11-804(8).
56. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *In Re MacAnally v. Levin*, 20 P.3d 1197 (Colo. App. 2000).
57. *But see Carland v. Metropolitan Life Insurance Co.*, 935 F.2d 1114 (10th Cir. 1991) (divorced husband was ordered to make wife the irrevocable sole beneficiary of his ERISA-covered life insurance. Husband named new wife as the beneficiary. Husband died. New wife and ex-wife both made claims on the proceeds. Held: the court's order that husband name ex-wife as the sole beneficiary of his life insurance was a qualified domestic relations order under ERISA, because it comported with the ERISA QDRO requirements as found in 29 U.S.C. § 1056(d)(3). Therefore ex-wife took the insurance proceeds.) *See also Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143 (9th Cir. 2000). *But see Deaton v. Cross*, No. S 01-202 (D. Md. 2/5/02).
58. C.R.S. 15-11-804(8).
59. C.R.S. § 24-51-101(33).
60. C.R.S. § 24-51-905, -906.
61. C.R.S. § 24-51-101(10).

62. C.R.S. § 24-51-802(3.5).
63. 10 U.S.C. § 1448.
64. *In re Marriage of Icke*, 540 P.2d 1076 (Colo. 1975); *Graff*, *supra* n. 31.
65. C.R.S. § 15-14-202(7).
66. *Troxel v. Granville*, 530 U.S. 57 (2000).
67. C.R.S. § 15-14-202, -204.
68. *In the Interest of A.R.D.*, 43 P.3d 632 (Colo. App. 2001).
69. *In re O.R.L. v. Smith*, 996 P.2d 788 (Colo. App. 2000).
70. *In the Interest of A.R.D.*, *supra* n. 68.
71. C.R.S. § 15-14-202(1).
72. C.R.S. §§ 15-14-206, 15-14-202.
73. C.R.S. § 15-14-413.
74. C.R.S. § 15-14-413(4).
75. C.R.S. § 15-14-431.
76. C.R.S. § 11-50-111.
77. C.R.S. §§ 11-50-101 *et seq.*
78. C.R.S. § 11-50-112.
79. C.R.S. § 11-50-111.
80. C.R.S. § 11-50-121.
81. C.R.S. § 11-50-111.
82. C.R.S. § 11-50-115.
83. 26 U.S.C. § 529.
84. 26 U.S.C. § 529 (c)(1).
85. IRS Publication 970, Chapter 6.
86. 26 U.S.C. § 529(c)(3).
87. 26 U.S.C. § 529(e)(5).
88. 26 U.S.C. § 529(b)(5).
89. 26 U.S.C. § 529(b)(3).