Changes to Colorado's Uniform Probate Code

by Elizabeth A. Bryant, Kimberly R. Willoughby, and Constance Beck Wood

This article discusses the significant legislative modifications made in 2009 and 2010 to Colorado's Uniform Probate Code, including intestacy rights of children born through assisted reproductive technology, the effect of a designated beneficiary agreement, and other important changes.

In 2009, the Colorado Legislature adopted changes to the Colorado Probate Code (Code) that had been proposed by the National Conference of Commissioners on Uniform State Laws. Because the Trust and Estate Section (Section) of the Colorado Bar Association was not able to thoroughly review the legislation prior to its enactment, the effective date of the changes was delayed until July 1, 2010. From June 2009 until January 2010, a subcommittee of the Section studied the legislation and proposed certain modifications to what was enacted in 2009. The proposed modifications were submitted to the legislature by the Section and became the basis for Senate Bill (S.B.) 10-199.

S.B. 10-199 made adjustments to what was enacted in 2009, to incorporate Colorado-specific provisions back into the Colorado Probate Code and to make other technical amendments. In 2010, the Colorado Legislature adopted the proposed bill, Governor Bill Ritter signed it, and it became effective July 1, 2010.

This article addresses the notable changes to the Code resulting from the passage of Uniform Probate Code III (UPC III). References to UPC III include changes made by both the 2009 and 2010 legislation.

UPC III and ART

Although much of UPC III involves modifications to the Code, CRS §§ 15-11-115 to -121 added to the Code the recognition that children are born by means of assisted reproductive technology (ART). UPC III sets forth how to identify a parent–child relationship for intestacy and class gift purposes when the child is a result of ART.

Overview of ART

The general definition of ART is human reproduction by any means other than sexual intercourse. ART includes the following:

- sperm donation
- egg donation
- embryo donation
- embryo adoption
- intra uterine insemination (IUI)
- *in vitro* fertilization (IVF)
- embryo transfer (frozen and tubal)
- gamete intrafallopian transfer (GIFT)
- zygote intrafallopian transfer (ZIFT)
- gestational surrogacy
- traditional surrogacy
- gamete cryopreservation
- embryo cryopreservation
- post-death gamete harvesting
- post-death conception
- disposition of cryopreserved embryos.

ART is used by many categories of intended parents: married opposite-sex couples, unmarried opposite-sex couples, older couples, single parents, married same-sex couples, unmarried same-sex couples, post-binary family structures, and widows and widowers.

The number of children created through ART is dramatically increasing. In 2008, the Centers for Disease Control and Prevention (CDC) published the 2006 Assisted Reproductive Technology Report. At that time, 483 fertility clinics were in operation. Ac-

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cording to the CDC, the number of ART cycles performed in the United States more than doubled in ten years—from 64,681 cycles in 1996 to 138,198 cycles in 2006. The number of infants conceived using ART also increased steadily from 1996 to 2006. In 2006, 54,656 ART infants were born, which was more than two-and-a-half times the 20,840 born in 1996. The American Society for Reproductive Medicine states that starting in 2002, approximately one in every one hundred babies born in the United States was conceived using ART, and that trend continues today.

ART is a $3 billion a year industry in the United States. Fertility clinics, sperm storage facilities, gamete donors, gamete donor agencies, surrogacy agencies, escrow agencies, specialty health insurance providers, mental health providers, and attorneys all generate income from the transactions involved in ART.

UPC III and ART Children

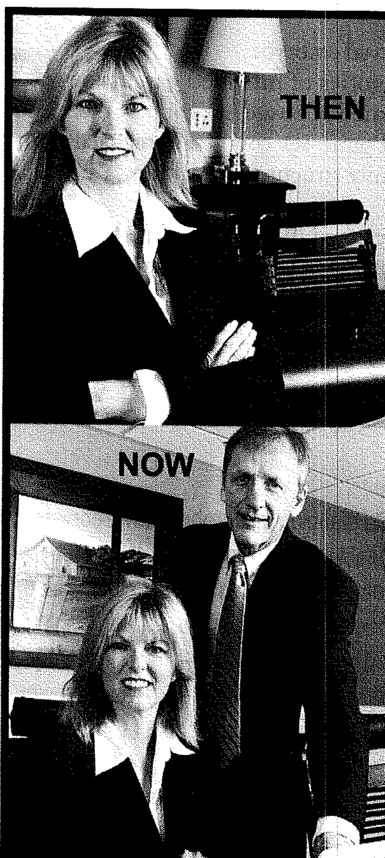
The ART provisions of UPC III set forth who is in a parent–child relationship for the purposes of intestacy and class gifts. The UPC III provides that a person is a parent of a child created through ART when that person has intended and consented to be the parent. A parent–child relationship can exist irrespective of genetic links and who birthed the child. A parent–child relationship can exist even where a child is conceived after the death of the parent.

The Comments to UPC III make clear that parent–child relationships can be established regardless of the marital status of the parents. The Comments also specifically recognize that same-sex parents exist. Although the Comments do not address the question of whether there can be more than two parents of a child for intestacy and class gift purposes, nothing in the statute or the Comments limits the number to two.

The determination of the parent–child relationship under the UPC III is limited to intestacy and class gift issues. Colorado's Uniform Parentage Act (UPA) has not been modified to be consistent with UPC III. The UPA does address some aspects of ART.[1] For example, there are circumstances where a parent-child relationship can be determined for the purposes of intestacy and class gifts, but the same people may not be in a parent–child relationship for UPA purposes, such as child support and the constitutional rights that flow from parentage.

CRS § 15-111-115. UPC III adds completely new provisions related to ART children. CRS § 15-11-115 was added to provide definitions related to who is in a parent–child relationship for intestacy purposes. Definitions directly related to ART are as follows:

- "Assisted reproduction" means a method of causing pregnancy other than sexual intercourse.
- "Functioned as a parent of the child" means behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as a regular member of that household.



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- "Genetic father" means the man whose sperm fertilized the egg of a child's genetic mother. If the father–child relationship is established under the presumption of paternity under CRS § 19-4-105, the term means only the man for whom that relationship is established.
- "Genetic mother" means the woman whose egg was fertilized by the sperm of a child's genetic father.
- "Genetic parent" means a child's genetic father or genetic mother.

CRS §§ 15-11-116 to -119. The new CRS §§ 15-11-116 to -119 re-codify the established concept under UPC that marital status is not determinative of a parent–child relationship. It also maintains the old rules for who "takes" when there was an adoption or an adoption is pending. UPC III expands those rules to include ART children who are adopted or in the process of being adopted.

CRS § 15-11-120. CRS § 15-11-120 addresses ART children who are not born to a gestational carrier. The statute states that a birth mother is the mother of the child, regardless of a genetic tie. The statute directs that an individual on a child's birth certificate is presumptively the parent of the child, regardless of a genetic tie. Under the statute, a person who consented to the assisted reproduction by the birth mother with the intent to be the other parent of the child is a parent. This intent can be established by showing: (1) a signed record of consent; (2) that the person functioned as a parent to the child no later than two years after the birth of the child; or (3) the intent to so function if that intent was thwarted by circumstances such as death or incapacity. If established by clear and convincing evidence, a person can be deemed to have intended to be treated as a parent of a posthumously conceived child. However, the child must be *in utero* no later than thirty-six months or born no later than forty-five months after the death of the parent.

Intent to parent is withdrawn automatically by a divorce before the placement of eggs, sperm, or embryos. Further, one can withdraw consent to being the parent of a child of assisted reproduction in writing done before the placement of eggs, sperm, or embryos.

The statute specifies that third-party donors are not parents. The statute limits people from taking from the estate of a child by simply signing a record of intent.

CRS § 15-11-121. CRS § 15-11-121 addresses ART children who are born to a gestational carrier. A gestational carrier is a woman who carries a child with the intent that he or she will be the child of another, and who is not the genetic mother of the child she is carrying. The statute also codifies the concept of an "intended parent." An intended parent is one who intends to be the legal parent of a child, irrespective of a genetic link to the child.

Under the new statute, a parent–child relationship does not exist between a child and a gestational carrier, but does exist between a child and the intended parent(s) of the child. The child must be *in utero* no later than thirty-six months after the death of the parent or born no later than forty-five months after the death of the parent.

The statute specifically separates the validity of surrogacy agreements from a determination of a parent–child relationship. In other words, even if such contracts are not valid, the parent–child relationship exists. Colorado has no law regarding the validity of surrogacy contracts.

CRS § 15-11-705. CRS § 15-11-705 addresses class gifts. The statute has been modified to specifically recognize ART children for the purposes of including them in the definition of a class. The general rule is that class gifts are construed in accordance with intestate succession. Exceptions to this rule are contained in CRS § 15-11-705(5) and (6).

CRS § 15-11-705(5) states:

> In construing a dispositive provision of a transferor who is not the genetic parent, a child of a genetic parent is not considered the child of the genetic parent unless the genetic parent, a relative of the genetic parent, or the spouse or surviving spouse of the genetic parent or of a relative of the genetic parent functioned as a parent of the child before the child reached eighteen years of age.

An example of this provision would be a gift in a governing instrument from a grandfather to his descendants. If the grandfather's deceased son fathered a child and the son never married the child's other parent, did not raise the child, and no relative of the son raised the child, that child would not take under grandfather's governing instrument. That child would, however, inherit from his or her genetic parent.

CRS § 15-11-705(6) modifies the rules of intestacy in adoption cases. If a child has not been adopted under the age of 18 and the transferor is not the genetic parent of the child, whether the child takes will depend on a set of facts like those contained in § 705(5). That factual determination does not come into play when the transferor is the genetic parent of a child.

The class closing rules have been expanded. They now recognize that, if there is an ART child in a class, that child might be *in utero* up to thirty-six months after the death of the parent and born up to forty-five months after the death of a parent.[2]

Practice Pointers

Estate planners must remember that a child can be a child for class gift purposes, even if the child is not biologically related to the parent, and even if the child is conceived after the death of the parent. Estate planning questionnaire or intake forms should include questions about ART, such as:

- Do you have any cryogenically preserved sperm, eggs,[3] or embryos?
- If so, where is the material stored?
- What is your intent for this material at your death?
- Is that intent recorded with your fertility clinic?
- Do any of your beneficiaries have any cryogenically preserved sperm, eggs, or embryos?
- Do you want to include children of ART, including children who may not be genetically related to you, in your classes of beneficiaries?
- Would you allow your spouse or parent to harvest gametes from you after your death, with the intent to create your child?

Probate administrators and trustees should know that nonbiological children and unborn children can be beneficiaries. They should ask questions to determine whether there are cryogenically preserved sperm, eggs, or embryos, and whether anyone can use them to create a child. If so, they should be trying to determine intent for this material. Generally, this intent can be determined by reviewing the forms completed with the fertility clinic that holds the material.

This new law does not mean a trustee cannot close an estate or make a distribution from a trust until forty-five months after death, for fear that someone is going to use a frozen embryo to create a new beneficiary. A parent–child relationship with a posthumously conceived child can be created only in limited circumstances that should be readily identifiable to fiduciaries.

Under CRS § 15-11-120, there must be either a writing that shows the decedent consented to be a parent posthumously or other clear and convincing evidence of intent. Marital status is not enough to presume intent. If intent is present, it is advisable either to wait to close the estate or to work out an agreement between all beneficiaries in that class.

Designated Beneficiary Agreement Act

The Designated Beneficiary Agreement Act (Act)[4] became effective on July 1, 2009. The Act permits unmarried adults to sign a designated beneficiary agreement (DBA) to give each other certain rights and appoint each other for certain roles. The new law affects the Code and provides new planning opportunities for all Colorado citizens who are not married.

Although a DBA generally has been viewed as an estate planning tool for same-sex and opposite-sex unmarried couples, its application is much broader and can include unmarried friends and relatives, such as an unmarried parent and his or her unmarried adult child, or a single senior and his or her caregiver.

There are certain criteria for creating a valid and enforceable DBA. First, there can be only two parties to a DBA, and all of the following criteria must be met:

1) both parties must be at least 18 years of age;[5]
2) both parties must be competent to enter into a contract;[6] and
3) the DBA must be entered into without force, fraud, or duress.[7]

Additionally, neither party may be married to anyone,[8] and neither party may be a party to another DBA with a different person.[9]

If both parties meet these requirements, the second set of criteria must be satisfied. The DBA form must be in substantial compliance with the standard form set forth in the Act.[10] It also must be properly completed, signed,[11] acknowledged by a notary,[12] and recorded with a county clerk and recorder where one of the parties to the DBA resides.[13]

"Substantial compliance" is defined in the Act. Essentially, the document is in substantial compliance if it includes the disclaimer contained in CRS § 15-22-106, the instructions and headings about how to grant or withhold a right or protection, the statements about the effective date of the DBA and how to record the agreement, the signatures for the two parties, and the acknowledgements for the notary public.[14] A downloadable DBA can be found online,[15] but as of the publication of this article, the form does not include the changes made by S.B. 10-199; therefore it is not legally correct. Attorneys can create their own form, using the downloadable form as a guide and modifying it to ensure compliance with S.B. 10-199.

The DBA is effective as of the date and time it is received for recording by the county clerk and recorder of the county in which one of the designated beneficiaries resides.[16] A DBA can be delivered or mailed, along with a filing fee in cash or check. The clerk and recorder must issue two certified copies of the DBA showing the date and time the office received the DBA for recording.[17] The filing fee may vary by county.

DBA Rights and Protections

There are sixteen categories of rights and protections set forth in a DBA. Six of the rights listed on the DBA are rights that parties already have under Colorado law, specifically the right to:

1) jointly acquire, own, and transfer title to property;[18]
2) be designated as a beneficiary in a will, trust, or for non-probate transfers;[19]
3) be designated as a beneficiary and recognized as a dependent in a life insurance policy;[20]

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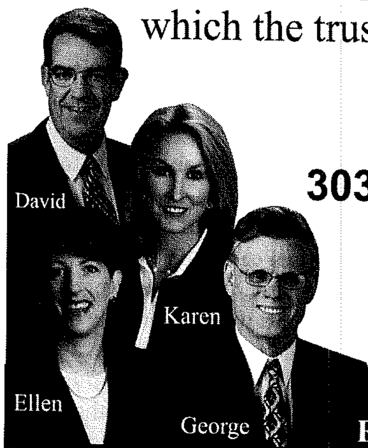

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4) be designated as a beneficiary and recognized as a dependent in a health insurance policy if the employer elects such coverage;[21]
5) be designated as a beneficiary in a retirement or pension plan;[22] and
6) act as a proxy decision maker or surrogate regarding medical decisions.[23]

Ten of the rights are new statutory rights for the parties under the Act, specifically the right to:

1) petition and have priority for appointment as conservator, guardian, or personal representative for the other designated beneficiary;[24]
2) visit the other designated beneficiary in a hospital, nursing home, hospice, or similar care facility;[25]
3) initiate a formal complaint regarding alleged violations of the other designated beneficiary's rights as a nursing home patient;[26]
4) obtain notice of withholding or withdrawal of life-sustaining procedures from the other designated beneficiary;[27]
5) challenge the validity of a living will of the other designated beneficiary;[28]
6) act as agent for the other designated beneficiary to make, revoke, or object to anatomical gifts;[29]
7) direct the disposition of last remains of the other designated beneficiary;[30]
8) inherit real or personal property from the other designated beneficiary through intestate succession;[31]
9) have standing to receive benefits pursuant to the Workers' Compensation Act of Colorado, in event of the death of the other designated beneficiary while on the job;[32] and
10) have standing to sue for wrongful death, in event of the death of the other designated beneficiary.[33]

There are several ways to revoke or terminate a valid DBA. One of the designated beneficiaries can unilaterally record a revocation of the DBA form with the county clerk and recorder of the county where the DBA originally was filed.[34] Revocation is effective as of the date and time received for recording by the county clerk and recorder.[35] The clerk must issue a certified copy of the recorded revocation to the designated beneficiary and must mail a certified copy of the revocation to the other designated beneficiary at that party's last known address.[36]

Another way to revoke a valid DBA, or a portion of a DBA, is for a designated beneficiary to sign a legal document that conflicts with all or a portion of the DBA, such as a will or a beneficiary designation for a life insurance policy.[37] A DBA is revoked on the marriage of either of the designated beneficiaries.[38] A DBA also is terminated on the death of a designated beneficiary; however, a right or power conferred on the living designated beneficiary survives the death of the deceased designated beneficiary.[39] Thereafter, the surviving designated beneficiary may enter into a new DBA with a different person, as long as the other requirements of the Act are met.[40]

Practice Pointers

Estate planning practitioners should update their estate planning questionnaire or intake forms to inquire whether a client or potential client has entered into a DBA. If so, a copy of the document should be obtained.

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A DBA does not override documents a client already may have or subsequently enter into, such as a will, trust, medical power of attorney, beneficiary designation under a life insurance policy, or retirement asset. Thus, a valid, legal document entered into before or after a DBA is recorded, which conflicts with all or a portion of the DBA, causes the DBA, in whole or in part, to be replaced or set aside.

Clients must understand that a DBA does not automatically designate the other party a beneficiary of contractual benefits, such as life insurance or retirement assets, or create co-ownership of real property. Such actions require additional documents.

It also is important for clients to understand that a DBA does not replace estate planning documents. The DBA is a Colorado document, and it is unclear whether it will be honored outside Colorado. When clients travel outside the state, they may need documents such as a medical power of attorney. Also, a DBA is limited in scope; it allows a party to name one decision maker. A medical power of attorney, on the other hand, names successor agents. Additionally, a DBA does not appoint an agent to handle the financial affairs of the other designated beneficiary, which means clients still may need a durable general financial power of attorney. Finally, although a DBA provides intestacy rights between the two parties, it cannot provide for the simultaneous death of both parties.

Although the rights conferred by a DBA are limited, there are several benefits. For example, a DBA is the only way for two unmarried persons to seek workers' compensation benefits if one of them dies at work. A DBA may give a party the right to sue for wrongful death in the event of the death of the other designated beneficiary. A DBA also may provide evidence that an opposite-sex couple is not in a common law marriage.

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Probate Issue

An issue that has caused great concern among Colorado's trust and estate practitioners is an unintended consequence of recording a DBA with the county clerk and recorder as required by law. When advising a person who wishes to serve as the personal representative in an intestate estate of an unmarried person, the practitioner should inquire as to whether the decedent entered into a DBA during his or her life. If the client does not know the answer, a search of the records of all sixty-four Colorado county clerk and recorders should be done prior to submitting any pleadings with the court to open the decedent's estate. If an unrevoked DBA is found, it must be reviewed to determine whether the decedent granted the right to petition and have priority to serve as personal representative or the right to inherit under intestate succession.

The Section's 2010 Omnibus Bill included a provision that would make information about recorded DBAs available on the Colorado Secretary of State's website, similar to the information available online about business entities, which would eliminate the need to conduct a search in all sixty-four counties before opening a probate administration. However, because establishing a central repository with the Colorado Secretary of State likely would add a fiscal note to the legislation, that provision was stricken from the 2010 Omnibus Bill. The provision might be part of the Omnibus Bill to be introduced in the 2011 legislative session. Unless and until such a provision becomes law, all counties must be searched when a client wishes to serve as the personal representative in an intestate estate of an unmarried person and does not know whether the decedent entered into a DBA during his or her lifetime.

Other Notable Changes to the Probate Code

Several other important changes were made to the Code. These are discussed briefly below.

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Notarized Wills

Prior to these changes, wills were presumed validly executed only if signed by two witnesses. Under CRS §§ 15-11-502, -503, and -504, wills can be presumed to be properly executed if the testator's signature is acknowledged before a notary public. This does not change what is required for a self-proved will. A notarized will likely will require that the probate be formally opened.

Reformation to Correct Mistakes

Under CRS § 15-11-806, courts now have the authority to reform governing instruments even if the instrument is unambiguous. Governing instruments are defined in CRS § 15-10-201 to include a deed; will; trust; insurance or annuity policy; multiple-party account; security registered in beneficiary form (TOD); pension; profit sharing plan; retirement or similar benefit plan; instrument creating or exercising a power of appointment or power of attorney; or a donative, appointive, or nominative instrument of any other type. The statute imposes a clear and convincing standard of evidence that the change or reformation is what the transferor intended. This section of the Code has already been the subject of an article in *The Colorado Lawyer*.[41]

Reformation to Achieve Tax Objectives

These Code changes also have given courts the authority to reform a will or trust to achieve the transferor's tax objectives under CRS § 15-11-807. The statute has a lesser standard of proof and requires only that the change not be contrary to the transferor's probable intent.

Cost of Living Adjustments

CRS § 15-10-112 contains the provision and formula for keeping the dollar amounts of certain sections of the Code in line with inflation. The only dollar amount actually changed in the 2009 legislation was the intestate share of a spouse in CRS § 15-11-102, but all of these sections: -102 (share of a spouse); -201(2) (supplemental elective share); -403 (exempt property); -405 (family allowance); and -15-12-1201 (small estate affidavit) now will have cost of living modifications. The changes will apply to estates in which a decedent dies in 2012 or later. The increases or decreases will be based on the consumer price index (CPI) for the year 2010 (the reference base index). The amounts stated in these sections must be increased or decreased if the CPI for the calendar year preceding the year of death exceeds or is less than the CPI for 2010. The change must be in multiples of $1,000 or there will be no change.

The Colorado Department of Revenue is charged with publishing a cumulative list with dollar amounts effective for a decedent's estate. This list must be published before February 1, 2012.

Protection for Personal Representatives

CRS §§ 15-12-703, 15-12-808, and 15-16-306 are intended to facilitate a timely administration of a probate estate in light of the extended periods in which a posthumously conceived child can be born and still affect a distribution. These provisions were added in the 2010 modifications to provide protection for personal representatives in making distributions, because they now could be liable in making distributions due to children born almost four years after the death of a parent. The personal representative will not be liable for making a distribution before the thirty-six-month or forty-five-month deadlines for posthumously conceived children if he or she did not receive notice or have actual knowledge of intent to use genetic material to create a child and that the birth of that child could affect the distribution.

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Notice Requirement

CRS § 15-12-705 imposes a duty on a personal representative to include a notice in the information of appointment to any person having information about the existence of genetic material and the intention or possible intention to use this genetic material to create a child whose birth would affect distributions. Any person having such information should give notice to the personal representative. This is now reflected in Information of Appointment form JDF 940.[42] The phrase "should give notice" was used to avoid imposing a liability for failure to provide notice to the personal representative.

Protection for Trustees

CRS § 15-16-306 extends the same safe harbor protection to trustees who make a distribution. This is intended to enable a trustee to make a distribution without fear of liability if the trustee did not receive notice or have actual knowledge of the intention to use genetic material to create a child and the birth of that child could affect the distribution. Changes to some of the language of this section will be changed in the next legislative session to give effect to the intent. After a personal representative or trustee has received notice or has actual knowledge of this intent, the personal representative or trustee must wait thirty-six or forty-five months before making a distribution.

Effective Dates

Section 17 of Chapter 310, Session Laws of Colorado 2009, and Section 18 provide that these changes to the Code took effect on July 1, 2010. They apply to governing instruments executed by decedents dying on or after July 1, 2010, no matter when the instrument was executed, and any proceedings pending in court or thereafter commenced regardless of the time of death of the decedent. The court may determine that the former statute should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of the of the Code. Any rule of construction or presumption applies to governing instruments executed before July 1, 2010, unless there is a clear indication of a contrary intent.

These changes do not apply to an action performed or governing instruments executed before July 1, 2010, if there is a clear indication of a contrary intent. These new probate statutes have a wide applicability and are not just limited to governing instruments of a transferor who died after July 1, 2010. Changes to CRS § 15-11-705 do not follow these effective date rules. The newly revised § 705 is effective only with respect to governing instruments executed, reaffirmed, or republished after July 1, 2010.

Conclusion

The changes to the Code under UPC III are not as extensive as those adopted in 1995, but have broad application to trust and estate practitioners. The effect of these statutory changes will be seen as case law develops.

Notes

1. CRS § 19-4-106.
2. CRS § 15-11-705(7).
3. Currently, unfertilized eggs are not cryogenically preserved other than for research; however, technology is quickly advancing to make it possible to cryogenically preserve unfertilized eggs.
4. CRS §§ 15-22-101 *et seq. See also* Bryant and Johnson, "Designated Beneficiary Agreement Act," 29 *Council Notes* 1 (Spring 2010).
5. CRS § 15-22-104(1)(a)(I).
6. CRS § 15-22-104(1)(a)(II).
7. CRS § 15-22-104(1)(a)(V).
8. CRS § 15-22-104(1)(a)(III.)
9. CRS § 15-22-104(1)(a)(IV).
10. CRS § 15-22-104(1)(b).
11. CRS § 15-22-104(2)(b).
12. CRS § 15-22-104(2)(c).
13. CRS § 15-22-107(1).
14. CRS § 15-22-104(1)(b).
15. *See* www.designatedbeneficiaries.org.
16. CRS § 15-22-107(1).
17. CRS § 15-22-107(3)(b).
18. CRS § 15-22-105(3)(a).
19. CRS § 15-22-105(3)(b).
20. CRS § 15-22-105(3)(c)(III).
21. CRS § 15-22-105(3)(c)(IV).
22. CRS § 15-22-105(3)(c)(I) and (II).
23. CRS § 15-22-105(3)(f).
24. CRS § 15-22-105(3)(d).
25. CRS § 15-22-105(3)(e).
26. *Id.*
27. CRS § 15-22-105(3)(g).
28. *Id.*
29. CRS § 15-22-105(3)(h).
30. CRS § 15-22-105(3)(l).
31. CRS § 15-22-105(3)(i).
32. CRS § 15-22-105(3)(j).
33. CRS § 15-22-105(3)(k).
34. CRS § 15-22-111(1).
35. *Id.*
36. *Id.*
37. CRS § 15-22-105(2).
38. CRS § 15-22-111(3).
39. CRS § 15-22-112(1).
40. CRS § 15-22-112(2).
41. *See* Walker, "Correcting Documentary Misdescription With Reformation," 39 *The Colorado Lawyer* 97 (Aug. 2010).
42. *See* www.courts.state.co.us/Forms/Forms_List.cfm/Form_Type_ID/143. ■

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