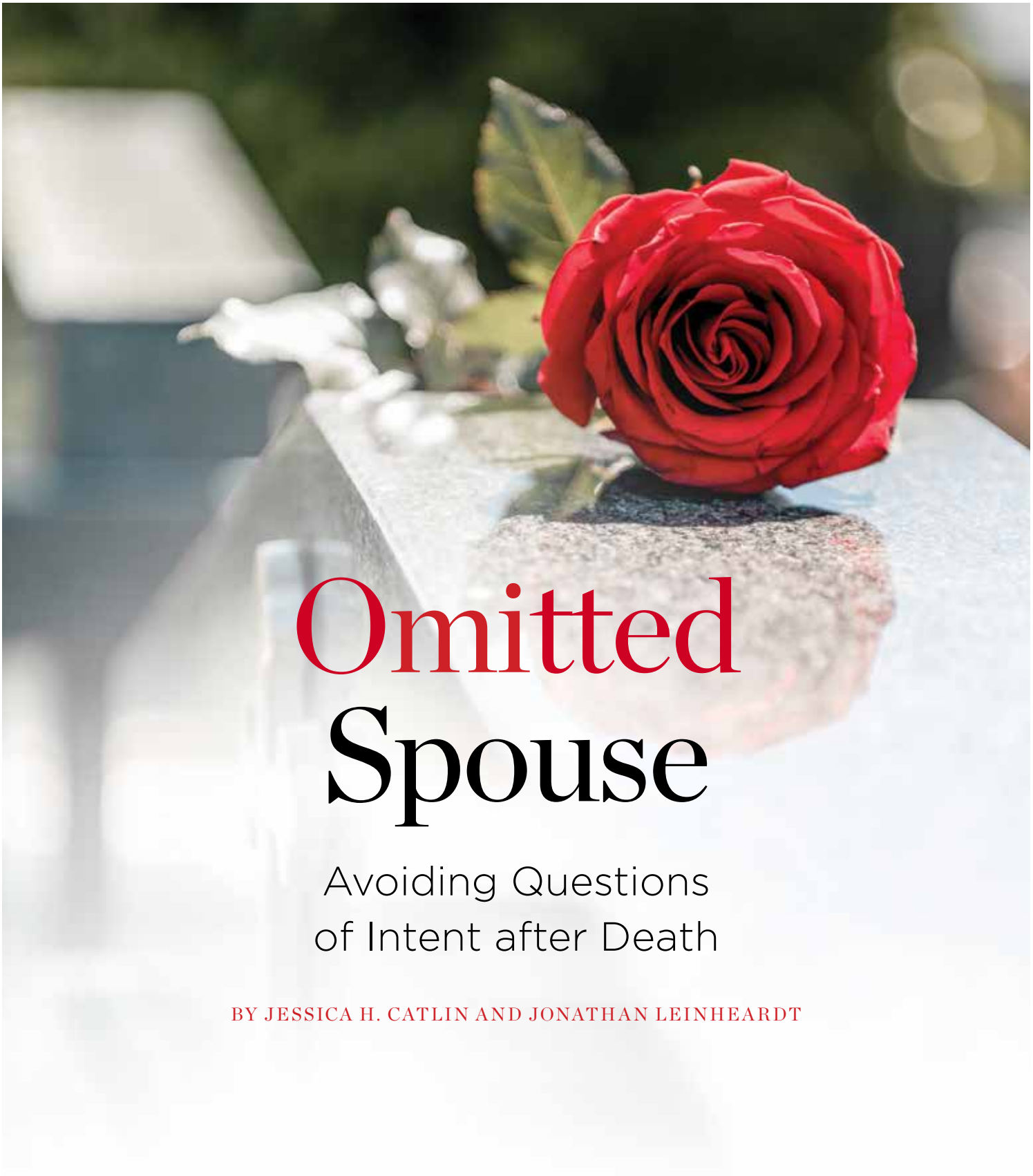

Omitted Spouse

Avoiding Questions of Intent after Death

BY JESSICA H. CATLIN AND JONATHAN LEINHEARDT

This article outlines the purpose of Colorado's omitted spouse statute, discusses how surviving spouses and children from a decedent's prior marriage may be protected, and suggests best practices for practitioners to ensure that the statutory provisions do not override the decedent's intent.

Premarital estate plans could cause unintended consequences for a surviving spouse, particularly in blended families. Colorado's omitted spouse statute protects a surviving spouse who has been unintentionally left out of a premarital will. It is the practitioner's role to understand the intent of both parties to the marriage and to help them plan for the disposition of each probate and nonprobate asset. This article focuses on a testator's right to dispose of their property and discusses when the omitted spouse statute may provide for a new spouse even when the decedent did not.

Purpose of CRS § 15-11-301

In the seminal case of *In re Estate of King*, the Colorado Court of Appeals stated: "The omitted spouse statute—section 15-11-301—of the Colorado Probate Code is designed to protect the testator's surviving spouse against unintentional disinheritance resulting from a premarital will."[1] The statute only protects a surviving spouse against an *unintentional* disinheritance, while also balancing a decedent's professed intent to protect premarital children. CRS § 15-11-301 is identical to the corresponding section of the Uniform Probate Code § 2-301.[2]

The definition of an "intestate share" in the omitted spouse statute is wholly different than the "share of spouse" definition in CRS § 15-11-102 (the intestate succession statute), which applies when a decedent dies without a will.[3] Under CRS § 15-11-301, a surviving spouse omitted from a will is entitled to receive as an "intestate share" only that amount of the decedent's estate (probate and nonprobate assets) *not* bequeathed, devised, or transferred to the decedent's children born prior to the marriage.[4] In contrast, if the decedent dies without a will and with premarital children, the surviving spouse is entitled to $150,000, with a cost-of-living adjustment,[5] plus one-half of the balance of the probate assets of an intestate estate.[6]

Because the omitted spouse statute provides an intestate share only in cases of unintentional disinheritance,[7] the statute does not apply if (1) the will was made in contemplation of the testator's marriage to the surviving spouse, (2) the will's clear language indicates it is effective even if there is a later marriage, or (3) the testator provided for the spouse by transferring assets outside the will and intended for such transfer(s) to substitute for any testamentary provisions.[8]

If a decedent left their entire estate in a will or trust to premarital child(ren) and did not provide for child(ren) of the surviving spouse, there is no portion of the estate remaining from which the surviving spouse can take an intestate share. Therefore, a court need not consider the exceptions in CRS § 15-11-301(1)(a)–(c), as there is no intestate share to which those exceptions would apply. Only when the decedent left any portion of their estate to persons other than their premarital children would any such portion potentially be subject to a claim from a surviving spouse as an unintentional omission. But portions of an estate left to individuals or entities other than the decedent's children may be subject to a claim from an omitted spouse, assuming that one of the exceptions above does *not* apply.

King illustrates how courts analyze applicability of the exceptions. *King* involved a testator, Mark King, who named his children from his first marriage as 85% beneficiaries in his estate planning documents executed prior to his marriage to his second wife, Julie. He left the remaining 15% to other family members and charities. He did not revise or revoke the documents after his second marriage, so they were still valid at the time of his death and did not account for Julie. He did, however, leave Julie $4 million from a life insurance policy, $52,000 from a joint bank account, and $410,806 from a retirement account. The magistrate concluded that because the exceptions in CRS § 15-11-301(1)(c) applied, Julie was not an omitted spouse. Julie appealed, and the court of appeals affirmed based on Mark's choice to leave the life insurance policy and other nonprobate assets to Julie, and because Mark modified the beneficiary designation on the life insurance policy from "partner" to "spouse" after the marriage, seemingly showing intent and knowledge.

The policy underlying the exceptions to the general rule of CRS § 15-11-301 is to try to ascertain and honor the decedent's intent. "Primary to will construction is the ascertainment of the testator's intent from the entirety of the instrument."[9] "If that intent is not prohibited by law, it is the duty of the courts to give effect thereto. The canons of construction then are but aids and never prevail over an intent that is clear or manifest."[10]

Considerations for Estate Planning When Remarrying

Litigation after the death of a spouse in a second or subsequent marriage where the will or trust omits the surviving spouse hinges on several key questions: Was the omission intentional? Did the decedent provide for the surviving spouse through nonprobate transfers? Did the spouses discuss or anticipate this outcome? These questions drive the need for early discussion and planning, which can avoid or diminish litigation between surviving spouses and children from

prior marriages, heirs, charities, or other beneficiaries. Marital agreements can play a key role in this planning.

Addressing Expectations of Potential Heirs

When contemplating a second or subsequent marriage, the expectations of both spouses should be clearly communicated and realistic. A premarital agreement can be a helpful tool for both estate planning and life planning purposes, especially when either spouse has children from a prior relationship. Such agreements seem to have a negative connotation in the eyes of the general public, but a premarital agreement is simply a contract between spouses that outlines each party's options and expectations during the marriage and after death.

A premarital agreement can address short- and long-term planning issues for each party, including asset distributions to premarital children, other beneficiaries, and/or charities. Moreover, discussion of these issues can give adult children of either spouse advance notice that long-range planning for a surviving spouse may delay or remove their "expected" inheritance.

Despite how some may feel, children have no "right" to inherit from a parent. Until one's death,[11] a person who is 18 years of age or older and who is of sound mind has the right to modify their estate planning documents, and their child has no vested right(s) to any property or disposition(s) as either a prospective heir or donee. A child's interest in a parent's estate is a mere prospect, "since before the death of his ancestor an expectant heir has no vested interest or right in the property which he may subsequently inherit. Any prospective interest, or right to inherit, as an heir is a mere expectancy or possibility, a mere hope or expectation."[12] "A will takes effect only upon the testator's death and generally speaks from that date."[13] Thus, if a parent changes their mind prior to death, the effect of the prior will is a nullity.[14] Though statutory law and caselaw supports the right of a parent to disinherit a child, that does not dampen the expectations, realistic or otherwise, of receiving a share of a parent's property at death.

Marital Agreements as Planning Tools

Premarital or marital discussions about financial expectations during and after the marriage can help avoid questions of intent that can lead to litigation after death or divorce. Family law attorneys or estate planners helping clients in blended-family situations are highly encouraged to consider marital agreements,[15] which, like other contracts, can be broadly or narrowly drafted to include numerous options for both divorce and death situations.[16]

The Uniform Premarital and Marital Agreements Act (UPMAA), CRS §§ 14-2-301 et seq., is the Colorado statutory section codifying prenuptial or postnuptial agreements (i.e., marital agreements). Because this article focuses on the provisions of the omitted spouse statute, it will mainly pivot off the situation involving a spousal death.[17]

A marital agreement gives the parties flexible and creative options that provide financial security for the surviving spouse upon the first spouse's death, including a qualified terminable interest property (QTIP) trust, a life estate in real property or other assets, or testamentary gifts. These planning tools set up realistic expectations for the surviving spouse's long-term use of assets, many of which may have been acquired or created long before the marriage occurred. In negotiating a marital agreement, both parties should consider the long-term financial ramifications and needs of the surviving spouse upon the death of the first spouse.

Although not required, marital agreements may include a waiver of statutory spousal rights upon death. Such rights include taking an interest in the deceased spouse's intestate estate or elective share of the augmented estate (including the decedent's interest(s) in their separate property), the exempt property allowance, the family allowance, and the homestead exemption.[18]

The most significant change to the UPMAA from the prior codification was the inclusion of language in CRS § 14-2-309 that explains when and why a marital agreement might not be enforceable. The UPMAA requires an agreement to contain "conspicuously displayed" language that ensures the parties understand that they may, among other things, be giving up their right to money and property if the marriage ends or their spouse dies.[19]

It appears the purpose of this waiver language was to ensure the enforceability of the contractual obligations while also acknowledging that prospective spouses to these types of contracts understand that the waivers may cause the surviving spouse to lose significant statutory rights. Although adult children do not necessarily have a right to inherit, there are some statutory protections for surviving spouses, including the spouse's share in an intestate estate,[20] a right to an elective share,[21] and entitlement of the omitted spouse.[22] Without a marital agreement waiving spousal rights upon death, a surviving spouse also has statutory rights to allowances of exempt property[23] and family allowance, which must be specifically waived, in addition to property waivers.[24]

Elective Share

A spouse who is not omitted but receives less than they expected from the deceased's estate may also have some financial protection under CRS § 15-11-202 (the elective share statute). The omitted spouse under CRS § 15-11-301 is treated differently from an elective share spouse under CRS § 15-11-202 in a couple of ways. A surviving spouse could potentially claim either an omitted spousal share or an elective share of the estate, depending on the circumstances of the case, if one choice makes more financial sense to the surviving spouse. The practitioner should beware of the statutory requirements to claim either such share and may need to run calculations about which statutory provision(s) are applicable and financially advantageous.

The elective share spouse is a surviving spouse who was married to the decedent at the time the decedent's estate planning documents were drafted, but for various reasons, was left less than a one-half share[25] of the decedent's estate. Under these circumstances, a surviving spouse is entitled to a 50% interest in the defined "augmented estate."[26] The calculation of the augmented estate is complicated, but the surviving spouse's share includes all of the decedent's probate and nonprobate assets passing to any person or charity under the terms of the decedent's estate plan.

There is a significant difference between the assets an elective share spouse may seek (the "elective share bucket") and those the omitted spouse may seek (the "omitted spouse bucket"). The omitted spouse bucket includes only those assets not passing to the children of the decedent (i.e., non-children beneficiaries or charities), while the elective share bucket includes assets otherwise allocated to children of the decedent. In a blended-family situation, the expectations of a surviving spouse and any premarital children may be wholly at odds and legally in conflict. Open communication, well-crafted agreements, and dispositional documents may alleviate these stressors.

Avoiding or Minimizing Chances of Litigation

While laypersons primarily consider marital agreements for divorce situations (hence their negative connotation), they can be equally helpful to avoid triggering the omitted spouse statute and other probate litigation after death. Following through on the promises made in marital agreements is key for each spouse after execution of such an agreement.

For example, if a marital agreement contains promises to provide for the surviving spouse with nonprobate assets—such as bank accounts, retirement accounts, life insurance policies, or other assets with a beneficiary designation or a payable-on-death (POD) or transfer-on-death (TOD) designation—it is imperative that steps to fulfill those agreements be taken immediately after the contract is executed. Failure to fulfill the contractual obligations of the marital agreement may invalidate the entire agreement (as a worst-case scenario) and may also require significant attorney fees to litigate, a wholly unfortunate outcome given the time and expense incurred to put the marital agreement in place. Because a decedent's estate is usually responsible for the payment of fees and costs incurred by the personal representative to defend the marital agreement, this diminishes the assets/property ultimately to be divided by the heirs, which is certainly not an optimal outcome.

Another way to avoid triggering the omitted spouse statute upon the first spouse's death or otherwise alleviate the difficulties of litigating a decedent's intent is to prove that the decedent planned for the intentional disinheritance. To do this, the testator of a will and/or settlor of a trust may republish estate planning documents after marriage. For example, they may execute new documents that include the name of the new spouse as part of the family but indicate that the testator/settlor intentionally does not provide for the new spouse under the will/trust, and is/may be using other or nonprobate assets to provide for the surviving spouse. Or they may republish the will or restate the trust with new terms. Keep in mind that without an enforceable marital agreement, the surviving spouse may also have a right to an elective share—assuming that this makes financial sense and the calculation of the augmented estate (which includes the assets of the surviving spouse) is beneficial to the surviving spouse.

Conclusion

Proper planning and open and frank discussions before or shortly after remarrying may avert or alleviate the need for later costly litigation involving allegations of an unintended omission of a surviving spouse. A surviving spouse may be surprised to learn that in Colorado, based on the language of CRS § 15-11-301, a premarital will that leaves everything to premarital children may cause significant financial hardship without proper planning and follow-through. CL


Jessica H. Catlin is a partner at Hurth, Sisk & Blakemore, LLP in Boulder. She has two decades of experience as a planner and litigator in trust and estate law, elder law, protective proceedings, appeals, and family law. Catlin previously served as chair of the Boulder County Bar Association Elder Law Committee and on the Boulder County Bar Foundation Board—jcatlin@hurth.com. **Jonathan Leinheardt** is a partner at Hurth, Sisk & Blakemore, LLP, with nearly three decades of experience as a litigator in trust and estate law, conservatorships/guardianships, appeals, and family law. He previously served as chair of the Boulder County Bar Association Elder Law Committee—jleinheardt@hurth.com.

Coordinating Editors: Emily Bowman, ebowman@dwkpc.net; David W. Kirch, dkirch@dwkpc.net

NOTES

1. *In re Estate of King*, 444 P.3d 863 (Colo.App. 2019).

2. Numerous other states that modeled their omitted spouse statute after the UPC have a different definition of the share that the omitted spouse is entitled to take, which is similar to the definition of an intestate share of the decedent's estate (i.e., if the testator had died without a will altogether). *See* UPC § 2-301 (entitlement of spouse; premarital will). For example, in Missouri, "'[i]f a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, *the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will*, unless it appears from the will that the omission was intentional or that the testator provided for the spouse by transfer outside the will, and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator, the amount of the transfer or other evidence.'" *See In re Estate of Ferguson*, 130 S.W.3d 656, 662 (Mo.Ct.App. 2004) (emphasis added) (quoting Mo. Rev. Stat. § 474.235). Other states, including Alabama, Idaho, North Dakota, and South Carolina, have similar statutory definitions of an intestate share of a decedent's estate for an omitted spouse. *See*, *e.g.*, *Ferguson v. Critopoulos*, 163 So.3d 330, 341 (Ala. 2014); *Matter of Estate of Keeven*, 716 P.2d 1224, 1228 (Id. 1986); *Matter of Estate of Knudsen*, 342 N.W.2d 387, 390 (N.D. 1984); *Green ex rel. Estate of Cottrell v. Cottrell*, 550 S.E.2d 53, 60–61 (S.C.App. 2001).

3. *In re Estate of King* did not address the "share of the estate surviving spouse would have been entitled to had she fallen under section 15-11-301." *Id.* It is unclear from the statute and caselaw if a surviving spouse's claim of a share under CRS § 15-11-301 would be calculated or proportionally divided between surviving spouse and other will devisees and the criteria for division of same.

4. CRS § 15-11-301(1).

5. The amount calculated for a 2022 surviving spouse's initial share of an intestate estate is $186,000. *See* Colo. Dep't of Revenue, Cost of Living Adjustment of Certain Dollar Amounts for Property of Estates in Probate: Nominal and Indexed Amounts by Year of Death (Jan. 20, 2022), https://www.courts.state.co.us/userfiles/file/Self_Help/Probate/COLA.pdf.

6. It is unclear from the statute whether the definition of the intestate estate under CRS § 15-11-301(1) would require inclusion of nonprobate assets transferred to persons other than children of a

decedent similar to CRS § 15-11-205(1)(b) or (c). Under a *King* analysis, that question seems to be addressed in item (4) of the 10-part factors by which a court should determine the equities of the case.

7. *See* UPC § 2-301 (2006) (comment section) ("This section reflects the view that the intestate share of the spouse in that portion of the testator's estate *not devised to certain of the testator's children*, under trust or not, [or that is not devised to their descendants, under trust or not, or does not pass to their descendants under the antilapse statute] is what the testator would want the spouse to have if he or she had thought about the relationship of his or her old will to the new situation") (emphasis added).

8. CRS § 15-11-301(1).

9. *Matter of Daigle's Estate*, 642 P.2d 527, 528 (Colo.App. 1982) (citing *In re Estate of Dewson*, 509 P.2d 311 (Colo. 1973)).

10. *Id.* (citing *Heinneman v. Colo. College*, 374 P.2d 695 (Colo. 1962)). *See also Odescalchi v. Martin*, 40 P.2d 241 (Colo. 1935) (intention of testator is controlling consideration in construction of will).

11. This assumes that the testator has testamentary capacity to execute estate planning documents. A person is not of sound mind if, when signing a will or trust, they were suffering from an insane delusion that affected or influenced their decisions regarding property included in the will or trust, or the person does not understand (1) that they are making a will; (2) the nature and extent of the property they own; (3) how that property will be distributed under the will or trust; (4) that the will or trust distributes the property as they wish; and (5) who would normally receive their property. Colo. Jury Instr., Civil 34:11. *See also In re Estate of Romero*, 126 P.3d 228 (Colo.App. 2005) (defining testamentary capacity and insane delusion); *Cunningham v. Stender*, 255 P.2d 977 (Colo. 1953) (defining testamentary capacity).

12. *Nelson v. Nelson*, 497 P.2d 1284, 1286 (Colo.App. 1972) (citing 26A C.J.S. Descent & Distribution § 61, quoted with approval in *Quintrall v. Goldsmith*, 306 P.2d 246 (Colo. 1957)).

13. *Heinneman,* 374 P.2d 695.

14. *In re Clarke's Estate*, 57 P.2d 5, 8 (Colo. 1936).

15. Marital agreements are also useful in situations where there is significant wealth, age, or child(ren) disparities between spouses-to-be.

16. CRS § 14-2-302(2).

17. While this article discusses how marital agreements can be used to address both divorce and death situations, martial agreements can and often are also used to address issues *during* the marriage, including financial planning, and payment of taxes and other debts incurred during marriage. *See* Smith et al., "Marital Agreements in Colorado," 36 *Colo. Law.* 53 (Feb. 2007).

18. CRS §§ 14-2-301 et seq.

19. CRS § 14-2-309(3).

20. CRS § 15-11-102.

21. CRS § 15-11-202.

22. CRS § 15-11-301.

23. CRS § 15-11-403.

24. CRS § 15-11-404.

25. The percentage for the elective share is based on the length of the marriage, but for purposes of this explanation, the example is a one-half interest in the assets of the decedent spouse.

26. *See* CRS §§ 15-11-202(1) and (2), and -203 to -207.