'Til Death Do Us Part

Where Probate Law Meets Family Law

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This article highlights intersections between probate and family law, featuring spouse's property interests in trusts, the automatic temporary injunction, the revocation of spouse's interests under the Colorado Probate Code, and representation of fiduciaries in divorce proceedings.

Family law intersects with probate law in many areas. While some practitioners have expertise in all of these areas, others do not. This article aims to assist practitioners by highlighting common situations where family and probate issues coexist, including:

- how spouse's interests in trusts are considered in divorce;
- the impact of the automatic temporary injunction on estate planning;
- provisions in the Colorado Probate Code addressing divorce, including a discussion of when bifurcation in a dissolution proceeding may be appropriate; and
- the unauthorized practice of law by fiduciaries in divorce cases.

Spouse's Property Interests in Trusts

When a divorce involves a spouse who is the beneficiary of a trust, his beneficial interest must be evaluated in the divorce proceeding to determine whether it is (1) a "mere expectancy" that does not "rise to the level of property";[1] (2) property, which is evaluated as income, separate property, or marital property; or (3) an economic circumstance. Separate property is property acquired before the marriage, including property acquired through exchange of such property or acquired by gift or bequest to one spouse, and property excluded from marital property by a valid marital agreement.[2] In a divorce proceeding, the court "shall" set aside to each party that party's separate property.[3]

Marital property is property acquired during the marriage that is not set aside as separate property, including any appreciation in value of separate property during the marriage.[4] Marital property is divisible by the court in any manner the court deems equitable (which does not necessarily mean equal).[5]

Income from any source is considered for the purposes of maintenance and child support[6] and includes gifts that are regularly received from a dependable source.[7]

Economic circumstances is a broad term used to cover the circumstances a court may consider in reaching equitable orders in a dissolution case.[8] These circumstances can include concrete, tangible things like a spouse's income, a spouse's separate property, or the total marital property.[9] Economic circumstances can also include intangible elements such as a spouse's reasonable needs for purposes

of maintenance, a spouse's potential earnings if the spouse is unemployed or under-employed, mental and physical health, non-monetary (or non-monetized) contributions to the marriage, and marital waste. Economic circumstances encompass virtually everything, with the exception of "mere expectancies" and non-financial marital misconduct. Economic circumstances as a whole are used in the court's equitable division of property.[10] For example, they are used to determine maintenance,[11] to justify deviations from the child support guidelines,[12] and are the basis for fee sharing awards in family law cases.[13]

Colorado Case Law Regarding Trusts

A spouse's interest as a beneficiary in a revocable trust or will before a decedent's death is considered a "mere expectancy" and does not factor into the division of property in a divorce matter.[14] When a spouse is a beneficiary of an irrevocable trust, however, that interest may be considered property.

Colorado case law addressing how interests in irrevocable trusts are considered in a dissolution action is nuanced and fact specific, so it is difficult to deduce rules that apply in all circumstances. Estate planners should consider the various cases when a client's goal is to protect a beneficiary from the potential impacts of a divorce. A complete survey of existing case law in this area is beyond the scope of this article, but the cases highlighted below analyze discretionary trusts, remainder interests, and income interests.

A discretionary trust (one where the trustee has complete discretion to decide whether to make a distribution of income or principal to the trust beneficiaries) is unlikely to be considered property of the beneficiary involved in a divorce, particularly if the beneficiary does not have a future vested remainder interest. Colorado courts have held that a spouse's beneficial interest in a trust is not considered property in a divorce action if the trustee has complete discretion and the trust has a spendthrift clause.[15] A spendthrift clause generally provides that a beneficiary cannot assign her interest in the trust.[16]

In *In re Marriage of Jones*, the Colorado Supreme Court stated that a discretionary trust differs from a trust that grants the beneficiary some future vested benefit that the trustee cannot withhold.[17] There was no such future vested benefit in *Jones*.[18] Similarly, the husband in *In re Marriage of Rosenblum* was the beneficiary of a totally discretionary trust, and upon his death, the assets passed to the next generation.[19] While the spouse's interest in a discretionary trust was not considered property, in both *Jones* and *Rosenblum* the trust was considered an economic circumstance.[20] To the extent that an interest in a trust is deemed to be property, any marital component of that property will be divided directly by the court.[21] If the interest is deemed not to be property, but only an economic circumstance, it will not be divided and may only be weighed in equity by the court against all of the other economic circumstances.[22]

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A spouse's remainder interest in a trust may be considered property, even if it is subject to the lifetime interest of another person. The Colorado Supreme Court, in *In re Marriage of Balanson*, held that the wife's remainder interest in a trust, which was subject to her father's income interest and power of invasion for support, care, and maintenance, was considered the wife's property in a divorce action.[23] While the corpus of the trust was considered separate property, the appreciation in value on the corpus during the marriage was considered marital property.[24]

The Colorado Court of Appeals' earlier decision in *Balanson* suggested in dicta that there may be a distinction between a general and limited power of appointment. The trust over which the wife's father held a general power of appointment, which allows the power holder to appoint the property to himself, his creditors, his estate, or the creditors of his estate, was not considered to be property.[25] A limited power of appointment is, as its name suggests, more limited—the permissible appointees do not include the power holder, his creditors, his estate, or the creditors of his estate.[26]

In perhaps an unexpected result, a mandatory income interest in a trust was not considered property by the Colorado Court of Appeals in *In re Marriage of Guinn*.[27] The Court's rationale was that the husband had no control over how the principal was invested and thus had no control over the amount of income produced.[28] In addition, the trustee had discretion to allocate receipts between income and principal.

Similar to *Jones* and *Rosenblum*, the fact that the husband was not a remainder beneficiary of the trust also factored into the Court's decision in *Guinn*.[29] The trust at issue in *Guinn* was a generation skipping transfer tax (GST) trust. Due to the typical structure and tax goals of a GST trust, the settlor's children are not the remainder beneficiaries; instead, the remainder beneficiaries are grandchildren or more remote generations. Accordingly, if a spouse is a beneficiary of a GST trust as a child of the settlor, such interest is probably an income interest or entirely discretionary interest, and therefore, unlikely to be considered property.

Because the case law is fact driven, domestic relations practitioners should review it in light of the specific circumstances of a case when a spouse is a beneficiary of an irrevocable trust. Conversely, this case law is also important for estate planners to consider when they are drafting irrevocable trusts.

The Automatic Temporary Injunction

Upon filing a petition for dissolution of marriage, the petitioner is bound by an automatic temporary injunction.[30] The injunction is binding on the respondent as soon as the respondent is served with the petition.[31] The automatic temporary injunction has two primary financial effects of which estate planners should be aware. First, the automatic temporary injunction prevents a party from "transferring, encumbering, concealing, or in any way disposing of, without the consent of the other party or an order of the court, any marital property, except in the usual course of business. . . ."[32] The injunction also prevents a party, without consent of the other party, from "canceling, modifying, terminating, or allowing to lapse for nonpayment of premiums, any policy of . . . life insurance that names either of the parties or the minor children as a beneficiary."[33] Domestic relations practitioners often seek sanctions for contempt for violation of the automatic temporary injunction, and also often use such violations in support of their positions with respect to property division in permanent orders.

As a companion to the concept of the automatic temporary injunction, the doctrine of marital waste also protects marital property during any period in which the parties are "in contemplation of" divorce.[34] Marital waste may occur where a party transfers marital property to a third party or third-party entity.[35] The transfer could take a variety of forms, whether donative or in exchange for services, but the touchstone is the intention to place assets out of reach of the innocent spouse for purposes of division of assets.[36] A court finding that marital assets have been wasted should value the assets as of the last day that they existed and award that value to the dissipating spouse.[37] This concept is inapplicable to gifts made during the course of marriage that are not in contemplation of a divorce.[38]

Divorcing spouses often seek the help of estate planning lawyers in contemplation of the dissolution of their marriage. A spouse going through or contemplating a divorce who requests that her estate planning attorney create a trust with the intent that the trust be funded with marital money is in danger of violating the automatic temporary injunction or perpetrating marital waste.[39] Even if the non-settlor spouse is to be named as a beneficiary, ceding assets to a trustee for the trustee's administration is still the transfer of some property interest. This falls within the core definition of a violation of the mandatory temporary injunction during a dissolution, and also falls within the concept discussed in *In re Marriage of Finer* of transfer of assets in contemplation of divorce.[40] Nonetheless, before concluding that the transfer would result in adverse consequences in the divorce for the potential client, it is important to explore the purposes of the trust and its funding, including the source of funds, and whether the opposing party would agree to the trust's creation.

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If a party contributes money as part of a lifetime plan of charitable giving, whether there is a violation of the automatic temporary injunction or marital waste can be difficult to assess.[41] A practitioner should consider whether the tax benefit of the transfer to the marriage outweighs the cost to the marriage. If the tax savings is significant, and the plan has been ongoing for a period of years, the transfer may be considered to be "in the ordinary course of business." In those circumstances, intentional refusal to carry on a plan that has a benefit to the marriage may be considered economic fault.[42] In evaluating the circumstances of these transfers, a court in equity may look to the surrounding circumstances of the parties' charitable giving to determine whether contributing (or not contributing) violates the automatic temporary injunction or constitutes marital waste. For example, in a blended family, where a spouse going through a divorce continues to contribute to trusts benefitting her heirs but neglects to contribute to a trust benefiting the heirs of her spouse, either the gifts made, or the gifts not made, could constitute marital waste. This tension with respect to the automatic temporary injunction may also apply where life insurance is used as a vehicle of estate planning.[43]

By its terms, the automatic temporary injunction applies only to property that is marital in character.[44] To the extent that a client wishes to transfer his separate property, whether in contemplation of or in the process of divorce, such transfer may be a legitimate vehicle for planning. Determining whether such property has a marital component and the marital value of the otherwise separate asset may present difficulties that militate against relying on the character of separate property because, absent a provision in a valid marital agreement to the contrary, the appreciation in value of a separate asset during the marriage, whether such appreciation is passive or active, constitutes marital property in Colorado.[45] Further, while Colorado law defines separate property to include property acquired from other separate property,[46] it also recognizes a presumption that property acquired during the marriage is marital.[47] Because the burden is on the proponent of separate property to overcome the presumption of marital property, a client engaging in planning in anticipation of or during a dissolution undertakes a good degree of risk in proceeding before the character of the property is determined by the court or agreed to by the parties.

As a best practice, probate practitioners should advise a party seeking services in contemplation of a divorce, or when a divorce is pending, to secure approval from the other spouse. This is permitted both in the context of insurance policies and transfers of assets.[48] Practitioners should use caution when seeking approval from the adversary spouse by ascertaining whether that spouse is represented by counsel, to avoid a potential violation of the Rules of Professional Conduct regarding communication with a represented person.[49]

The Probate Code (Revocation Issues)

The Colorado Probate Code includes default provisions addressing what happens to revocable instruments in a divorce. Because these provisions only apply to revocable instruments,

it is particularly important for estate planners to address what happens with an irrevocable trust in a divorce.

Upon the death of a spouse, the surviving spouse has several rights under the Colorado Probate Code, including a right to family allowance, exempt property, and elective share, and in the absence of a will, an intestate share.[50] A person is not considered a surviving spouse for the purposes of these rights if the marriage ends by divorce or annulment.[51] This is true even if Colorado does not recognize the divorce or annulment as valid under Colorado law,[52] or when a decree entered in Colorado or another state is subsequently found to be invalid, but the decedent, relying on the decree, entered into a marriage with a third party.[53] Finally, a person is not considered to be a surviving spouse where she was a party to a proceeding that terminates all marital property rights.[54] But a decree of separation is not enough to sever the rights of a surviving spouse for the purposes of the Colorado Probate Code.[55]

The Colorado Probate Code also deals with the severance of a former spouse's rights in instruments upon divorce or annulment where the other spouse had a right to revoke property interests or fiduciary appointments.[56] These property interests include any disposition or conferral of a power of appointment on the former spouse or the former spouse's relative. The revocation affects any instrument that the spouse alone was empowered to revoke, including most commonly a will, revocable trust, joint tenancy with rights of survivorship, and payable-on-death designations.[57] Any interest that is revocable is revoked, and joint tenancy with rights of survivorship is severed into tenants in common.[58] An exception exists for transfers for value to third parties.[59] Further, the doctrine of preemption prevents the application of severance under the probate code with respect to beneficiary accounts covered by the Employee Retirement Income Security Act of 1974 (ERISA).[60]

The fiduciary nominations and appointments could include an agent under a power of attorney, and a guardian, conservator, personal representative, or trustee. Any nomination or appointment of the former spouse or a relative of the former spouse, which the other spouse alone is empowered to revoke, is revoked.[61]

Estate planners can override these revocation provisions by addressing the circumstance of divorce directly either in a revocable instrument or a marital agreement.[62] While it can be a difficult topic to discuss with a happily married couple, addressing this circumstance may ease or avoid a dispute in the future and assist the client's future family law attorney.

Because the default provisions in the Colorado Probate Code do not apply to irrevocable trusts, it is particularly important to include language addressing the effect of divorce. For example, a couple may have an intricate wealth transfer plan that involves several irrevocable trusts, including irrevocable life insurance trusts, intentionally defective grantor trusts, and grantor retained annuity trusts. A spouse may be either the trustee or a beneficiary of one of these trusts. A divorce will not sever such spouse's interest pursuant to the Colorado Probate Code. The estate planner may therefore want to include language such as: "If my marriage to my husband ends by divorce or annulment, my husband will no longer be a beneficiary or a trustee under this trust and will be considered to have predeceased me." Any language must, however, consider the intent of the parties and the tax considerations that were likely the catalyst for the wealth transfer plan in the first place.

A problem could arise when one spouse dies while a divorce action is pending. Because the default provisions in the Colorado Probate Code only apply upon divorce or annulment, the former spouse still has rights until the decree is entered. Language could be included in an instrument to indicate exactly when a spouse's rights terminate. For example, the trust could provide that the spouse's rights are terminated upon the filing of a petition for dissolution. This will not, however, address the spouse's right to a family allowance, exempt property, or elective share. While these rights can be waived in a marital agreement, these rights cannot be waived unilaterally by the other spouse.[63] Accordingly, any attempt to change an estate plan and disinherit a spouse before entry of a decree may be thwarted by the spouse's statutory rights.

Failing Health and a Failing Marriage

When a spouse is ill and may die during the pendency of a divorce, bifurcation of the divorce proceeding may be helpful. Bifurcation is the entry of a divorce decree before the division of property.

The ordinary rule in dissolution of marriage cases is that the action abates on the death of one of the parties.[64] A court may, however, defer the division of property until some date after entry of the decree if doing so would be in the parties' best interests.[65] A decree of dissolution cannot, however, be entered until at least 91 days have passed since the filing of the petition for dissolution.[66]

In *Estate of Burford v. Burford*, the Colorado Supreme Court's determination of the parties' marital status by the entry of the decree was "the heart of the dissolution proceeding."[67] Where the trial court entered a decree before the death of one of the spouses, but did not divide property, the Court determined that the trial court retained jurisdiction to divide property and that the action did not abate.[68] The Court held that bifurcation should be used only in exceptional cases, citing the decedent's age and poor health, the wife's potential right to claim an elective share, the complexity of financial issues, the litigiousness of the parties, and that the wife would "not be placed at a disadvantage by the bifurcation order."[69] The Court specifically mentioned the spouse's rights under the probate code as a basis for bifurcation.[70]

An estate planner may wish to advise his clients regarding *Burford* where a divorce outcome may be preferable to an estate outcome for the client. For example, the client may have a marital agreement that protects the client's assets in the event of a divorce, but does not have any estate planning elements, such as a waiver of the elective share.[71] If the client becomes estranged from the client's spouse and seeks to write the spouse out of the client's will, the client's intentions may be thwarted by the elective share.[72] On the other hand, the client may be able to initiate a dissolution of marriage action with the aim of obtaining a decree before the client's death.

Referral to a divorce attorney may also be prudent to protect a client whose spouse, in anticipation of her death, moves cash assets into payable on death or whole life accounts that do not name the client as a beneficiary. The Colorado Court of Appeals has determined that changing payable on death beneficiaries does not, in and of itself, constitute a violation of the automatic temporary injunction.[73] Nonetheless, a party who observes a spouse making these types of changes may be able to prevent negative effects by seeking entry of a divorce decree before the death of the other party.

Divorces that Involve Fiduciaries

Probate practitioners may need assistance from family law practitioners in the context of a divorce where one or both parties have a conservator or guardian.

A guardian or conservator can maintain a dissolution action on behalf of a ward.[74] A non-attorney conservator or guardian, however, cannot proceed pro se in a dissolution action[75] because a conservator or guardian is acting in a representative (not personal) capacity, and proceeding in a dissolution action is engaging in the practice of law.[76] The ward or protected person is entitled to trained legal assistance so that her rights will be fully protected. "A nonlawyer conservator or guardian in Colorado is a statutory legal representative only . . . ."[77] Accordingly, even though a guardian or conservator may have already engaged a probate practitioner, it may be necessary to engage a family law attorney to assist with the divorce proceeding if the probate practitioner does not have this expertise.

Similarly, if a person with diminished capacity is contemplating divorce, a family law practitioner may want to engage a probate practitioner to assist with creating a guardianship or conservatorship before proceeding with the divorce.[78]

Conclusion

In both probate and family law matters, individuals often navigate difficult family dynamics. There are many ways, in addition to those discussed above, that the law in these areas intersects. It is important for probate and family law practitioners to identify these intersections and seek assistance from each other when necessary to properly represent clients. CL


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NOTES

1. *In re Marriage of Rosenblum*, 602 P.2d 892, 894 (Colo.App. 1979).
2. CRS § 14-10-113(2).
3. CRS § 14-10-113(1).
4. CRS § 14-10-113(2).
5. *In re Marriage of Antuna*, 8 P.3d 589 (Colo. App. 2000).
6. CRS §§ 14-10-114(8)(c) and -115(5).
7. *See In re Marriage of Nimmo*, 891 P.2d 1002, 1007–08 (Colo. 1995).
8. CRS § 14-10-113(1)(c), governing property division, states that the court shall consider all of the relevant factors in determining division of marital property, including "economic circumstances of each spouse at the time the division of property is to become effective." CRS §§ 14-10-114(3)(c)(I) and (II) on maintenance cites financial resources of the payor and payee spouse as factors in determining maintenance. CRS § 14-10-115(8)(e) allows the court to deviate from the presumptive amount of child support where it finds that the circumstance would render the presumptive amount inequitable. And CRS § 14-10-119 allows the court to equitably allocate attorney fees between the parties after considering the financial resources of the parties.
9. Marital and separate property are defined in CRS § 14-10-113(2). Income for spousal maintenance purposes is defined in CRS § 14-10-114(8)(c) and for child support purposes in CRS § 14-10-115(5).
10. *See* CRS § 14-10-113(1)(c) (stating that a court dividing property must consider all relevant factors, including "economic circumstances of each spouse at the time the division of property is to become effective.").
11. *See* CRS §§ 14-10-114(3)(c)(I) and (II) (citing the financial resources of the payor and the payee as factors in determining maintenance).
12. *See* CRS § 14-10-115(8)(e) (allowing a court to deviate from the child support guidelines where the circumstances of the parties would render inequitable an award of child support pursuant to the guidelines).
13. *See* CRS § 14-10-119 (allowing the court to consider the financial resources of the parties).
14. CRS § 14-10-113(7)(b). This statute seems to specifically exclude from property or financial circumstances any interest in any "donative third party instrument which is amendable or revocable, including but not limited to third party wills, revocable trusts, life insurance . . . nor shall any such interests be considered as an economic circumstance or other factor."
15. *In re Marriage of Jones*, 812 P.2d 1152 (Colo. 1991). *See also Rosenblum*, 602 P.2d 892.
16. *Jones*, 812 P.2d at 1156.

17. *Id*. at 1157.

18. *Id.*

19. *Rosenblum*, 602 P.2d at 893.

20. *Id.* at 894; *Jones*, 812 P.2d at 1158.

21. *See* CRS § 14-10-113(1).

22. *See, e.g.*, CRS § 14-10-114(3)(c) (setting forth a variety of factors examined to determine the amount and term of maintenance).

23. *In re Marriage of Balanson*, 25 P.3d 28, 41 (Colo. 2001).

24. *Id.* at 42.

25. *In re Marriage of Balanson*, 996 P.2d 213 (Colo.App. 1999). *See also* Chorney, "The Continuing Evolution of *Balanson*: Trusts as Property in Divorce," 34 *The Colorado Lawyer* 89 (June 2005).

26. IRC § 2041.

27. *In re Marriage of Guinn*, 93 P.3d 568, 572 (Colo.App. 2004).

28. *Id.*

29. *Id.* at 571. The Court did not address whether husband's income interest in the trust was "income" for purposes of the divorce, which issue did not seem to be on appeal. Nonetheless, the Court considered the discretionary transfers to be gifts. Gifts can be considered income if they are "readily received from a dependable source." *Nimmo*, 891 P.2d at 1008. *See also* CRS §§ 14-10-114(8)(c)(I)(U) and -115(5)(a)(I)(U).

30. *See* CRS § 14-10-107(4)(b)(I) for the full extent of the automatic temporary injunction.

31. *Id.*

32. CRS § 14-10-107(4)(b)(I)(A).

33. CRS § 14-10-107(4)(b)(I)(D).

34. *In re Marriage of Finer*, 920 P.2d 325 (Colo.App. 1996).

35. *Id.*

36. *See, e.g.*, *In re Marriage of Pooley*, 996 P.2d 230 (Colo.App. 1999) (holding that a wife's transfer of personal injury funds during the marriage to an irrevocable trust with an independent trustee was not marital waste because the Court declined to find that the transfer was for an improper purpose).

37. *Finer*, 920 P.2d 325.

38. *See In re Marriage of Schmedeman*, 190 P.3d 788 (Colo.App. 2008) (there was no marital waste where husband made a gift of a log cabin during the marriage, over wife's objection, but not in contemplation of divorce). *See also In re Questions*, 517 P.2d 1331 (Colo. 1974) (stating that a party's right to an interest in the other's property remains inchoate during the marriage).

39. *See Pooley*, 996 P.2d 230 (recognizing that instances exist where transferring property into a trust would constitute dissipation of the property). *See also Martinez v. Gutierrez-Martinez*, 77 P.3d 827 (Colo.App. 2003) (Court supported a finding of marital waste where husband transferred assets from a joint account to an account in his own name).

40. *Finer*, 920 P.2d 325.

41. These concerns may also exist for other avenues of succession planning. Advising a client to set up a whole life insurance policy in anticipation of divorce may be fraught with as many difficult questions as creating or funding a trust.

42. *See In re Marriage of Jorgenson*, 143 P.3d 1169 (Colo.App. 2006) (finding marital fault in husband's refusal to pay loan obligations of a business, resulting in default on the debt). The facts of the case are complicated by other adverse findings as to husband's credibility as well as specific findings that husband violated the automatic temporary injunction in other respects.

43. *Compare* CRS § 14-10-107(4)(b)(I)(D), which prevents a party from allowing to lapse any policy of life insurance that names either party or the minor children as a beneficiary, *with* CRS § 14-10-107(4)(b)(I)(A), which restrains a party from encumbering assets of the marriage. *See also Finer,* 920 P.2d 325, regarding marital waste. A court may look with scrutiny, for example, at a whole life policy contracted for immediately before or after the party files for divorce.

44. CRS § 14-10-107(4)(b)(I)(A).

45. CRS § 14-10-113(4).

46. CRS § 14-10-113(2)(b).

47. CRS § 14-10-113(3).

48. CRS §§ 14-10-107(4)(b)(I)(A) and (b)(I)(D).

49. Colo. RPC 4.2.

50. CRS §§ 15-11-101 et seq.; CRS §§ 15-11-201 et seq.; and CRS §§ 15-11-401 et seq.

51. CRS § 15-11-802.

52. CRS § 15-11-802(2)(a).

53. CRS § 15-11-802(2)(b).

54. *Id. See also Matter of Hutchins' Estate*, 602 P.2d 889 (Colo.App. 1979) (finding that an interlocutory decree in California constituted an order purporting to terminate all marital property rights). This scenario might also apply to the determination of the validity of a pre-nuptial agreement where the agreement purports to terminate all marital property rights.

55. CRS § 15-11-804(1)(b).

56. CRS § 15-11-804.

57. *Id.*

58. CRS § 15-11-804(2).

59. CRS § 15-11-804(3).

60. *See In re Estate of MacAnally*, 20 P.3d 1197 (Colo.App. 2000) (holding that husband's failure to designate his new wife as the beneficiary of his TIAA-CREFF account to replace his ex-wife meant that his ex-wife was entitled to the benefits of the account).

61. CRS § 15-11-804(4).

62. CRS § 15-11-804(2).

63. CRS §§ 15-11-213. *See also In re Estate of Smith*, 674 P.2d 972, 973 (Colo.App. 1983).

64. *See In re Marriage of Connell*, 870 P.2d 632 (Colo.App. 1994) (stating the rule that because divorce is purely personal in nature, that action abates upon the death of one of the parties).

65. CRS § 14-10-106(1)(b).

66. CRS § 14-10-106(1)(a)(III).

67. *Estate of Burford v. Burford*, 935 P.2d 943, 952 (Colo. 1997).

68. *Id.* at 955.

69. *Id.* at 951.

70. *Id.*

71. While the specifics of marital agreements are beyond the scope of this article, practitioners drafting such agreements often depart from the statutory defaults and define things such as appreciation in value of separate assets and income from separate assets as having separate, rather than marital, character.

72. CRS §§ 15-11-201 et seq.

73. *Estate of Westfall v. Westfall*, 942 P.2d 1227 (Colo.App. 1996) (where wife transferred cash assets into payable on death accounts with her brother as a beneficiary, and then took her own life, there was no violation of the injunction with respect to the money moved).

74. CRS §§ 15-14-315.5 and -425.5.

75. *In re Marriage of Kanefsky*, 260 P.3d 327 (Colo.App. 2010).

76. The unauthorized practice of law is addressed in Colo. RPC 5.5.

77. *Kanefsky*, 260 P.3d at 330. Under similar reasoning, a non-attorney trustee may not proceed pro se on behalf of a trust in Colorado. "[A] trustee acts as a representative of the trust beneficiaries' interests." *Application for Water Rights of Town of Miniturn*, 359 P.3d 29, 31 (Colo. 2015). Non-attorneys cannot undertake activities that require the exercise of legal discretion or judgment on behalf of others. *Id. Kanefsky* references other state opinions that also apply this rule to the personal representative of an estate who proceeds in matters outside of the estate action. *Kanefsky,* 260 P.3d at 331.

78. CRS §§ 15-14-315.5 and -425.5.