PREMARITAL AGREEMENTS AND MARITAL AGREEMENTS:

EVERY MARRIAGE WILL END . . . ARE YOUR CLIENTS READY?

Denver Estate Planning Council – March 21, 2024

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I. INTRODUCTION

Not just for the "rich and famous" any more, premarital agreements, marital agreements, and cohabitation agreements have become recognized as an important tool in an attorney's toolbox. All marriages end – either as the result of a divorce/legal separation, or as the result of a party's death. These agreements allow people to opt out of the state's default rules and to create rules governing the disposition of property that reflect that particular couple's values and life-circumstances. These materials will examine the keys to enforceability of these agreements under current Colorado law; the pros and cons of these agreements, particularly as they relate to a family's wealth preservation and succession planning objectives in the face of a family member's divorce; and trends in Colorado divorce cases that will increase the importance of these agreements.

II. WHY HAVE AN AGREEMENT?

It may go without saying, but every relationship will come to an end. Marriages always end either as a result of divorce or at the death of the first spouse to die. A cohabitation also must come to an end, either because the parties marry, break up, or because one party dies. While the reasons that soon-to-be spouses, current spouses, and cohabitating couples might want an agreement governing their relationship are largely the same, for the sake of simplicity, let's look at why people might choose to enter into a premarital agreement.

Many people think of premarital agreements as a tool for "protecting" themselves in the event of a divorce. While this is certainly a possible function of premarital agreements, premarital agreements fit into a much broader wealth planning perspective.

People marry at different times in life, one time or multiple times, and in all kinds of economic conditions. What people expect of their marriages, and what they expect at the end of their marriages, varies dramatically depending on their personal circumstances. Some people feel that the "love" that is the basis of their impending marriage is somehow compromised or brought into question by the process of entering into a premarital agreement, although this view is not as prevalent as it once was. However, there are many good reasons for couples to consider having a premarital agreement. Among them:

- **Create certainty with respect to the disposition of property at the end of the marriage.** Every state imposes default rules upon married people with respect to the division of property at the end of a marriage. These statutory rules vary dramatically from state to state. Furthermore, each state's courts are charged with the responsibility for interpreting the statutory default rules that have been put in place by the legislature. The courts' interpretations of any given rule may change over time, resulting in rules regarding the disposition of property that could not have been anticipated when the decision to marry was made. Moreover, the disposition of property for a couple who is

married in one state but later moves to another will be governed by the law of the state where they reside at the time of death or divorce. Few couples bother to educate themselves about these rules as they move from one geographic location to another.

Premarital agreements allow couples to establish certainty with respect to how their property will be handled in the event of death or divorce and to reach agreements regarding their property that reflect their values and ideals. This contractual agreement between the parties can completely waive the state law rules that would apply in the absence of the agreement and can establish the rules that will govern the disposition of property. By reaching such an agreement, a couple can avoid the variations in different states' laws, and the uncertainty of evolving judicial interpretations, thereby creating certainty with respect to each spouse's financial well-being.

A premarital agreement should be viewed as an important tool in a lawyer's tool box because unlike wills and other dispositive documents, a premarital agreement cannot be changed by one spouse without the knowledge and consent of the other. Premarital agreements therefore present a more certain planning device as far as the surviving spouse is concerned.

- **Protect family-owned or closely held businesses in the event of death or divorce.** Premarital agreements can serve as a mechanism for avoiding expensive and time-consuming battles over the valuation of a business or partnership interest by specifying the disposition of such business interests irrespective of value. The litigation that surrounds business interests in the context of divorce proceedings can be incredibly disruptive to the business operations and can have the effect of dragging family members into the litigation. Additionally, many family members appreciate the assurance that they will not end up being forced into business arrangements with another family member's spouse. This concern can be addressed through buy-sell agreements among the company's owners but can also be incorporated into a premarital agreement.

- **Protect family legacies and provide assurance to older generations who have accumulated wealth.** Many families who have accumulated wealth want to insure that their money is available for many future generations. The more that they can keep their wealth for the benefit of their lineal descendants, the longer the family money is likely to last. Family members who are related by marriage rather than blood are seldom afforded the same access to family wealth. Premarital agreements can serve an important role in implementing an extended family's wealth preservation objectives.

- **Provide for and protect the interests of children from prior marriages.** This concern is particularly acute in later marriages where one or both spouses have children from a prior marriage. A premarital agreement can serve the purpose of assuring the children that their inheritances will remain intact despite

a new spouse on the scene. Conversely, a premarital agreement can also help to document and solidify a party's intentions with respect to providing for their surviving spouse, despite the existence of children from previous marriages, thereby minimizing the chances of later disputes between family members.

- **Provide security and benefits to a "less-propertied" spouse.** Premarital agreements do not need to be "all or nothing" contracts. Premarital agreements can provide a measure of financial security for a less-propertied spouse, which can ease a common concern that they will be left out in the cold after a long marriage.

- **Simplify and reduce the bitterness and expense that often accompanies divorce.** Because the couple has the opportunity to agree on what is "fair" to them at a time when they are getting along, and because they can create certainty with respect to issues that are often litigated in the course of divorce proceedings, premarital agreements can reduce the complexity, bitterness, and expense that can often accompany divorce proceedings.

- **Keeping family wealth out of the hands of lawyers.** There are many legal issues that provide fodder for attorneys who wish to pursue zealous advocacy. Litigation of these issues (some of which are discussed below) can be extremely expensive.

III. ENFORCEABILITY UNDER THE UMPAA.

The validity of a premarital or marital agreement is determined based on the law in effect at the time during which the agreement is entered. Since July 1, 2014, premarital and marital agreements in Colorado have been governed by the Uniform Premarital and Marital Agreements Act, C.R.S. §§14-2-301, et seq. ("UPMAA").

Under the UPMAA, a **Premarital Agreement** is an agreement between two people who intend to marry, which affirms, modifies, or waives one or more marital rights (a) during the marriage, (b) in the event of a legal separation or dissolution of marriage, (c) at the death of one of the spouses during the marriage, or (d) upon the occurrence or non-occurrence of some other event. C.R.S. §14-2-302(5). A **Marital Agreement** serves the same function, but is an agreement between two people who are already married and who intend to remain married. C.R.S. §14-2-302(2). Once a marriage is heading towards divorce, parties cannot enter into a marital agreement.

There are **four** grounds for challenging the validity of a marital or premarital agreement under the UPMAA, all of which address the **process** by which an agreement is entered:

1) Consent to the agreement was involuntary or under duress;

2) The party did not have **access** to "independent legal representation" (which means that before signing the party had (i) reasonable time to

(w) decide whether to hire a lawyer, (x) locate a lawyer, (y) obtain the lawyer's advice, and (z) consider the lawyer's advice, and (ii) the party had the financial resources to retain the lawyer or the other party agreed to pay reasonable legal fees);

3) If the party did not **have** independent legal representation, the agreement did not include a notice of waiver of rights or an explanation in plain language of the marital rights and obligations being affected by the agreement; or

4) The party did not receive adequate financial disclosures before signing the agreement.

C.R.S. §14-2-309(1).

A. Adequate Financial Disclosure.

Lack of adequate financial disclosure is perhaps the most common ground on which premarital agreements are challenged. Before 1986 and the enactment of the Colorado Marital Agreement Act ("CMAA")[1], premarital agreements in Colorado were governed by common law. The case law focused on whether a party entering into a prenuptial agreement had made an affirmative effort to conceal material information rather than whether there had been an effort to make full and fair financial disclosure. See *e.g.*, In re Estate of Stever, 392 P.2d 286 (Colo. 1964) (parties had known each other for 25 years, no formal financial disclosures had been made, but wife knew about husband's various parcels of land, even if she did not know their values; agreement upheld; no evidence of fraud, deception, or concealment); IRM Ingels, 596 P.2d 1211 (Colo. App. 1979) (no detailed list of assets required where wife had general knowledge of husband's assets, even if unaware of their exact value); c.f., Linker v. Linker, 470 P.2d 921 (Colo. App. 1970) (agreement invalid where parties knew each other two months when agreement was signed, wife was German national with no understanding of Colorado law, husband had attorney and wife did not, and no financial disclosures were made). However, over time, the courts began to look at what the challenging party knew, rather than what the defending party might have affirmatively concealed. Using this approach, the Colorado courts consistently held that a detailed disclosure was not required so long as the disclosure is "fair and reasonable and general and approximate." In re Estate of Lewin, 595 P.2d 1055 (Colo. App. 1979); see also Estate of Lebsock, 618 P.2d 683 (Colo. App. 1980) (general and approximate knowledge of the other's net worth is enough, but there is no duty of inquiry in a prenuptial agreement setting).

With the enactment of the **CMAA** in 1986, the affirmative duty of financial disclosure became more clear. The CMAA required that each party be "provided a fair and reasonable disclosure of the property or financial obligations of the other party." The

[1] The CMAA governs premarital agreements entered into between July 1, 1986 and June 30, 2014. The UPMAA became effective July 1, 2014 and remains in effect today. Premarital agreements were governed by common law prior to enactment of the CMAA.

seminal case in Colorado describing the duty of fair disclosure is Estate of Lopata, 641 P.2d 952 (Colo. 1982)[2], where it was said:

> Fair disclosure is not synonymous with detailed disclosure such as a financial statement of net worth and income. The mere fact that detailed disclosure was not made will not necessarily be sufficient to set aside an otherwise properly executed agreement . . . . Fair disclosure contemplates that each spouse should be given information, of a general and approximate nature, concerning the net worth of the other. Each party has a duty to consider and evaluate the information received before signing an agreement since they are not assumed to have lost their judgmental faculties because of their impending wedding.

The **UMPAA** requires "adequate financial disclosure," which is defined as "a reasonably accurate description and good faith estimate of value of the property, liabilities, and income" of a party. The requirement of a written disclosure can be skipped if a party has adequate knowledge of that information regarding the other party, C.R.S. §14-2-309(4) (UPMAA); however, this is not recommended.

Despite the different wording in the different statutes, the standard for adequate financial disclosure has remained fairly static for many years. The inquiry should be based on whether the party challenging the agreement had a reasonable understanding of the other's financial situation. See *e.g.*, IRM Newman, 653 P.2d 728 (Colo. 1982) (wife had worked as husband's bookkeeper prior to marriage and knew he was a man of "substantial wealth"). The purpose of requiring financial disclosures is to ensure that the party entering into the agreement – particularly the less propertied spouse – is aware of the financial circumstances of the party who stands to benefit from the agreement and has some basis for evaluating the rights being waived and the benefits being secured.[3] The adequacy of disclosures should therefore be measured with this purpose in mind.

B. Involuntary or Under Duress.

The UPMAA provides for challenge of a premarital agreement if consent to the agreement was involuntary or under duress. C.R.S. §14-2-309(1) (UPMAA). An agreement that is entered into under duress is not entered into voluntarily.

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[2] Estate of Lopata was decided before the enactment of the CMAA; however, it continues to be cited with respect to the disclosure requirement. The only case that discusses the disclosure requirement in connection with a prenuptial agreement that was clearly entered into under the CMAA is IRM Seewald, 22 P.3d 580 (Colo. App. 2001), where the court held an agreement entered into in 1990 to be invalid where husband's balance sheet attached to the agreement was blank, husband said he had given list of assets to wife, but trial court resolved that issue in favor of wife who said that he had failed to make complete financial disclosures.

[3] Some courts in other states have held that a prospective spouse cannot be said to have knowingly and voluntarily entered into an agreement if they do not have an understanding of the rights and property being affected by the proposed agreement. See Estate of Lutz, 563 N.W.2d 90, 97-98 (ND 1997); Fletcher v. Fletcher, 628 NE.2d 1343, 469-70 (Ohio 1994); IRM Matson, 730 P.2d 668, 673 (Wash. 1986).

A contention that an agreement was entered into under "duress" most often arises when the agreement was signed very shortly before the wedding. However, where there has been an opportunity for reflection regarding the agreement's terms, the timing of the execution should not impact the validity of the agreement.[4] IRM Ross, 670 P.2d 26 (Colo. App. 1983) (holding no duress where agreement was signed on the wedding day because "[t]here is evidence in the record that wife had and took an opportunity for reflection, and counseled with and had the benefit of her attorneys' advice.")

Courts in other states looking at "duress" in the family law setting have held that "there can be no 'duress' without there being a threat to do some act which the threatening party had no legal right to do – some illegal exaction or some fraud or deception." Gribbin v. Gribbin, 499 So.2d 858, 861 (Fla. App. 4 Dist. 1986). Duress involves "a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition." Id.; see also Colorado Jury Instructions 30:20 Duress (2023) (although the comments make clear that this jury instruction does not apply where there is a confidential relationship, as is the case with marital agreements).

A refusal to go through with the wedding unless the agreement is signed does not constitute duress because one is perfectly within one's rights to decide not to marry at any time. Francavilla v. Francavilla, 969 So.2d 522 (Fla. App. 4 Dist. 2007) ("the husband's ultimatum that he would not marry the wife without a prenuptial agreement does not constitute duress because there is nothing improper about taking such a position"); see also Heald v. Crump, 215 P. 140 (Colo. 1923) (a threat to do what one may lawfully do does not constitute duress). To hold otherwise would likely invalidate most premarital agreements.

There is only one published Colorado opinion where a prenuptial agreement was invalidated based on circumstances that might be described as involuntary execution or duress, although the court found "constructive fraud" and "overreaching." See Linker v. Linker, 470 P.2d 921 (Colo. App. 1970). Wife was a German national who had recently come to the United States. She was unsophisticated and spoke little English. She knew Husband for 1-2 months when the agreement was signed. Husband had an attorney and Wife did not. No financial disclosures were made. Wife had no knowledge of her legal rights in the absence of the agreement and did not understand the effects of the agreement. Courts rarely see facts as extreme as these, yet this is one of the few published cases in which a premarital agreement has been successfully challenged on the basis of duress. See also, IRM Counts, Case No. 07 DR 127, Moffat County District Court, Colorado (where husband threatened to report his fiancé's illegal immigration status to the INS if she did not sign the agreement and marry him, the agreement was not entered into voluntarily.).

[4]If the legislature wanted to impose a requirement that an agreement be signed a certain amount of time before the wedding, it certainly could impose such a requirement, but it hasn't. *See e.g.*, Ca. Fam. Code §1615 (requiring seven days between first presentation of the agreement and date of execution of the agreement).

C. Independent Legal Counsel.

Prior to enactment of the UPMAA, the CMAA did not address the requirement of independent legal counsel; and, in fact, lack of independent counsel was seldom a successful attack on the enforceability of a marital agreement. See Estate of Lopata, 641 P.2d 952 (Colo. 1982) (lack of independent counsel not ground for challenge); IRM Ingels, 596 P.2d 1211 (Colo. App. 1979) (same); IRM Stokes, 608 P.2d 824 (Colo. App. 1979) (same); c.f., Linker v. Linker, 470 P.2d 921 (Colo. App. 1970) (agreement invalidated where wife lacked independent counsel, but entire agreement was colored by fraud and overreaching).

Under the UMPAA, C.R.S. 14-2-309(1)(b), there are two grounds for challenging the validity of a premarital agreement involving the question of independent counsel. The analysis is two-fold: If the party had independent legal counsel, then this ground for challenge goes away. If the party did not, then in order for the agreement to be enforceable, the party must have had: (1) access to independent legal counsel, ***and*** (2) the agreement must include a plain statement of the rights and obligations that are modified by the agreement or a notice of waiver of rights "conspicuously displayed," substantially similar to the following:

> **If you sign this agreement, you may be:**
>
> **Giving up your right to be supported by the person you are marrying or to whom you are married.**
>
> **Giving up your right to ownership or control of money and property.**
>
> **Agreeing to pay bills and debts of the person you are marrying or to whom you are married.**
>
> **Giving up your right to money and property if your marriage ends or the person to whom you are married dies.**
>
> **Giving up your right to have your legal fees paid.**

C.R.S. §14-2-309(3). Many attorneys include this language in their agreements even when both parties have counsel.

Even if an agreement contains this notice of waiver of rights, the agreement will still be invalid if the party challenging the agreement lacked ***access*** to legal counsel. This is statutorily defined and means that before signing the agreement the party had (i) reasonable time to (w) decide whether to hire a lawyer, (x) locate a lawyer, (y) obtain the lawyer's advice, and (z) consider the lawyer's advice, and (ii) the party had the financial

resources to retain the lawyer or the other party agrees to pay reasonable legal fees.[5] C.R.S. §14-2-309(2).

D. Unenforceable Terms in and Otherwise Enforceable Agreement

Notwithstanding that a premarital agreement was properly entered into and is therefore valid as a whole, there may still be limitations to enforceability of certain terms based on the public policy of Colorado and other considerations. These types of challenges all relate to the substance of the agreement, rather than the process by which it was entered into, and are discussed more fully in Section IV, below.

IV. PREMARITAL AGREEMENTS IN THE CONTEXT OF DIVORCE.

A. The Cans and Cannots of Premarital Agreements.

- Parties to a marital or premarital agreement **can** contract with respect to:
  - Virtually any property issue that might arise between married couples, both during the marriage and at its end;
  - Spousal maintenance***;***
  - Responsibility for debts and liabilities, both during the marriage and at its end; and
  - An award or allocation of attorneys' fees and costs.

C.R.S. §14-2-302(4) (UPMAA).

- Parties to a marital or premarital agreement **cannot**:
  - Adversely affect the right of a child to child support;
  - Limit the remedies available to victims of domestic violence;
  - Modify the grounds for a legal separation or divorce;
  - Penalize a party for filing for divorce or legal separation;
  - Define rights and duties with respect to parental rights and responsibilities; or
  - Violate public policy.

C.R.S. §14-2-310. Additionally, while not automatically discarded, terms that relate to custodial arrangements for children are not binding on the court. C.R.S. §14-2-310(3).

[5]It is commonplace, and not improper, for one party (or one party's family) to pay for the other's attorney if there is a large disparity in financial position.

This means that care should be taken before drafting provisions that give a spouse one thing if they decide to leave the marriage but more if the other party decides to leave. Provisions based on fidelity are likely also subject to challenge.

B. Maintenance and Attorneys' Fees.

The UPMAA permit parties to contract with respect to spousal maintenance or support. C.R.S. §14-2-302(2), (3) & (5). However, C.R.S. §14-2-309, which governs enforcement, provides in pertinent part:

> (5) A premarital agreement or marital agreement or amendment thereto or revocation thereof that is otherwise enforceable . . . is nevertheless unenforceable insofar, but only insofar, as the provisions of such agreement, amendment, or revocation relate to the determination, modification, limitation, or elimination of spousal maintenance or the waiver or allocation of attorney fees, and such provisions are unconscionable at the time of enforcement of such provisions. The issue of unconscionability shall be decided by the court as a matter of law.

The seminal case on the enforcement of a maintenance provision in a marital agreement is In re Marriage of Newman, 653 P.2d 728 (Colo. 1982). It held that the maintenance provisions of a premarital agreement would not be enforced if they are unconscionable due to a change in circumstances at the time of a later divorce. Its holding was more or less codified in the CMAA, C.R.S. §§14-2-301, *et seq.*, which was enacted four years later and is now part of the UMPAA in Colorado. More than a decade after establishing an unconscionability review for maintenance provisions, the Colorado Supreme Court determined that attorneys' fees provisions are subject to the same review for unconscionability at the time of enforcement as are maintenance provisions. In re Marriage of Ikeler, 161 P.3d 663 (Colo. 2007); see also In re Marriage of Dechant, 867 P.2d 193 (Colo. App. 1993). Both are based on public policy considerations.

- **Question:** What does "unconscionability" mean in the context of the maintenance provisions of a premarital agreement? Not clear. The rationale in Newman for needing a review based on "unconscionability" at the time of enforcement was based on "changed circumstances." However, the standard articulated by the Newman court is proof that "the maintenance agreement rendered the spouse without a means of reasonable support, either because of a lack of property resources or a condition of unemployability." Id. at 736. This is not any different than the standard that must be met to obtain maintenance in the absence of a premarital agreement. Attorneys' fees are also freely awarded despite waivers in a premarital agreement if the requirements of C.R.S. §14-10-119 are met.

- **Question:** What does it mean to be able to contract with respect to a maintenance provision if the court reviews the parties' circumstances at the time of the divorce as if no agreement existed?

- **Question:** Is it worth addressing maintenance and attorneys' fees in premarital agreements given these limitations on enforceability?

C. Prevailing Party Attorneys' Fees Provisions.

IRM Sanchez-Vigil, 151 P.3d 621 (Colo. App. 2006), holds that a valid fee-shifting provision in a separation agreement should be upheld even when Colorado law in the absence of the agreement would not provide for an award of fees. However, this holding relied on In re Marriage of Ikeler, 148 P.3d 347 (Colo. App. 2006), where the Colorado Court of Appeals had held that the fee provisions of a marital agreement are enforceable. Ikeler's holding was reversed by the Colorado Supreme Court on appeal, 161 P.3d 663 (Colo. 2007), where it was held that a waiver of attorneys' fees in a prenuptial agreement is subject to a conscionability review at the time of enforcement for the same public policy reasons as maintenance waivers are reviewed. It remains to be seen whether a prevailing party fees provision will be treated differently than an overall waiver of fees in a premarital agreement. See also IRM Christen, 899 P.2d 39 (Colo. App. 1995) (enforcing a fee shifting provision relating to a challenge in a prenuptial agreement entered into under the CMAA); c.f. IRM Fiffe, 140 P.3d 60 (Colo. App. 2005) (finding that a prevailing party attorneys' fees provision in a prenuptial agreement could not be enforced in relation to a divorce that did not involve a challenge to the agreement in part because there is no "prevailing party" in dissolution of marriage cases). As a practical matter, prevailing party attorneys' fees provisions do seem to deter frivolous challenges to the validity of a premarital agreement in Colorado divorces.

D. Divorce and Trusts: Framing The Issue.

Colorado statutes provide that all property acquired by either spouse subsequent to the date of marriage, with a few exceptions, is marital property. C.R.S. §14-10-113(2). One applicable exception is property acquired by gift, bequest, devise, or descent. The statute was revised in 2002 to clarify that for purposes of determining marital property, "property" or "an asset of a spouse" shall not include an interest a party may have under a donative third party instrument which is amendable or revocable. C.R.S. §14-10-113(7)(b).

The development of the case law in Colorado regarding treatment of interests in trusts as property for purposes of property division in a dissolution proceeding is still evolving, and beneficial interests in trusts are still being hotly litigated at tremendous expense, more than 20 years after In re Marriage of Balanson, 25 P.3d 28 (Colo. 2001).

Bottom Line: Your client should have a premarital agreement if he or she is, or will become, the beneficiary of irrevocable trusts during the marriage.

E. The Nightmare of Trusts in Divorce: Five Case Studies

Start with the fact that most divorce lawyers in Colorado do not know how to read a trust agreement or to analyze beneficial interests in trusts. Then add a landscape of evolving law with many undecided issues remaining. This combination is a recipe for

nightmarish and extremely expensive divorces where one party is a beneficiary of an irrevocable trust. The following are examples from actual cases:

1. ***Renounced Interest*** Wife is a beneficiary of a trust established by her grandfather. The trust is located in Texas and is administered by a Texas trustee. Wife is entitled to discretionary distributions of income and "net increment to corpus." At age 25, Wife was entitled to withdraw 1/3 of the trust corpus, although the trustee has the authority to prohibit the withdrawal at any time in the wife's best interests. Other than this right of withdrawal, Wife is not entitled to any distributions of the trust's original corpus during her lifetime. When Wife attained age 25, she (like all of her grandfather's other grandchildren) signed a document waiving her right to the 1/3 distribution, electing instead for the assets to remain in trust. This renunciation was signed during the marriage.

Issues:

a. Does Wife have a "property" interest in the trust?

b. Was Wife's renunciation valid and/or effective?

- Does a Colorado divorce court have jurisdiction to decide whether the renunciation was effective?
- Do the Trustee or the other grandchildren have to be joined as parties before a determination of the renunciation's validity can be made?
- Should the validity of the renunciation be determined under Colorado or Texas law?

c. Should the 1/3 share be analyzed as a "self-settled" trust? And if so, should Colorado or Texas law apply to determine the effect of that determination on the "property" question?

d. Does it matter whether the renunciation was signed prior to or during the marriage?

2. ***Termination of Trust Interests***. Wife is the remainder beneficiary of a marital trust created by her mother for the lifetime benefit of her father. At the time of mother's death, the marital trust is worth $5 million. Wife is an only child. Wife is also married at the time of her mother's death. Fifteen (15) years after the marital trust is created, Wife's father dies. The marital trust terminates and Wife receives a terminating distribution of $10 million. Three (3) years later, Wife finds herself in the midst of an ugly divorce. The terminating distribution, which she has kept solely in her own name, is now worth $9 million.

Issues:

The parties agree that Wife's remainder interest in the marital trust was her separate property pursuant to Balanson II. They also agree that Wife has a property interest in the trust distribution once it was received.

a. Is the property interest that Wife "inherited" by virtue of becoming a remainder beneficiary of the marital trust the same interest that Wife received possession of when her father died? Or was the remainder interest extinguished and replaced by a separate property "inheritance" when Wife's father died?

b. Is the appreciation in value to Wife's separate property interest (for the purpose of determining marital property) measured from the date that her mother died? Or, if the possessory trust distribution is a different "interest" from the remainder interest, is appreciation measured from the date that her father died?

c. If Wife's separate property interest arose upon creation of the marital trust at the time of her mother's death, was her remainder interest worth $5 million (the value of the trust assets) or something less due to the application of discounts?

Depending on how these questions are answered, the marital property available for division may be $0, $4 million, or something more than $4 million (if discounts are applied to the starting value of the remainder interest).

3. ***Barriers to Divorce Resolution*.** Husband is a beneficiary of multiple trusts created by various relatives, which are administered in Illinois and Missouri. He is the primary beneficiary of three, with a combined value of approximately $2 million, from which he is entitled to purely discretionary distributions of income and principal. Husband's descendants are also beneficiaries of those three trusts. Husband's mother is the primary beneficiary of the remaining trusts and is entitled to mandatory distributions of income and discretionary distributions of principal from each of them during her life. Husband (and his siblings and their descendants) is entitled to discretionary distributions from some of them during his mother's lifetime, but he is entitled to nothing from others until his mother has died. At his mother's death, Husband (and his siblings) will receive the remainder of three trusts. Collectively, those trusts have increased in value by $30 million during the marriage. Husband, the consummate "trust fund baby," is unemployed, lives beyond his means, is heavily in debt, and has a net worth of approximately $500,000 outside of trust.

Issues:

The parties agree that Husband has a property interest in the three trusts in which he has a remainder interest, that his interests in those trusts are his separate property, and that the increase in value to Husband's interest in those trusts is marital property. Nevertheless, the following issues exist:

a. How much discovery is Wife entitled to concerning her mother-in-law's health and use of the trust assets? How much discovery may she obtain regarding administration of the trusts and distributions made to other beneficiaries (of which there are 20)?

b. If the trusts contain millions in marital property, what can the court award to Wife?

c. If the court reserves jurisdiction to make an award of marital property, will it value Husband's interests in the trusts now or when his mother dies?

d. If the court awards Wife maintenance based on discretionary distributions to Husband, what assurances does Wife (or the court) have that those distributions will continue to be made?

e. Can the trustees be joined in the Colorado divorce proceedings?

f. If Wife obtains a judgment against Husband based on the value of his trust interests, can she enforce it against the trustees? Will she have to go to Missouri or Illinois to do so?

g. How can Husband settle the case when he has only $500,000 in assets? Alternatively, how can he fund the litigation?

All of these issues, which affect the entire family, could have been avoided had these trust beneficiaries entered into premarital agreements! Each of these cases cost hundreds of thousands of dollars in attorneys' fees to resolve.

4. ***Powers of Appointment.*** Wife is the remainder beneficiary of a Balanson type of trust, which will be distributed outright to the wife (and her sibling in equal shares) upon the death of her father. However, her father has a testamentary special power of appointment which allows him to direct the trust assets at his death among any of his descendants. Thus, he could direct the trust assets in such a manner that daughter receives nothing. Or, if he does not exercise his power, she will receive one-half of the remainder interest.

a. Is the remainder interest in this trust a classic Balanson property interest or is it considered a revocable instrument in accordance with C.R.S. §14-10-113(7)(b) (despite the trust being self-described as irrevocable)?

b. Does the analysis change, if in fact, the father has exercised his power of appointment in his will to direct the wife's interest into an irrevocable lifetime discretionary trust, assuming father is still living?

c. Does the analysis change depending on whether the power of appointment is general or limited? Intervivos or testamentary?

d. This is a legal issue which, so far, has no answer from the Colorado Court of Appeals or Supreme Court and is the subject of much controversy at the divorce level. Experts have taken different views on this issue, and those views can depend on the exact language of the trust regarding the power of appointment, whether the parent has exercised his/her power of appointment, and whether the parent is still living (and can change the power of appointment).

e. In re Marriage of Butterworth addresses this issue and is currently pending in the Colorado Court of Appeals.

5. **Self-Settled Asset Protection Trusts**. Husband owns 76% of company; Wife owns 24%. The parties had a huge liquidity event when they sold the company in 2 tranches. After the first sale but before the second, their financial advisor suggested that they create a Wyoming "qualified spendthrift trust" – more commonly known as a creditor protection trust – and that they fund it with their remaining interests in the company. The trust was recommended for income tax, creditor protection, and estate planning purposes. Husband, wife, wife's children from a prior marriage, and husband's brother are lifetime discretionary beneficiaries, except that wife's beneficial interest terminates in the event of a divorce. Trust holds approximately 50% of the parties' wealth. Husband is the investment advisor. The validity, construction and administration of the Trust are governed by Wyoming law.

Issues:

a. What remedies are available to a Colorado divorce court to address the fact that 50% of what would otherwise be marital property was transferred to this trust, and now only benefits Husband?

b. Does a Colorado divorce court have jurisdiction to invalidate the trust if it finds it is illusory or colorable?

c. Is the trust a "self-settled trust" under Colorado law and therefore void as to Husband's creditors under C.R.S. §38-10-111? If so, is Wife a creditor?

d. Can a Colorado court impose remedies involving the trust without joinder of the trustee and the other trust beneficiaries?

e. What kind of ancillary proceedings might be warranted in Wyoming?

V. PREMARITAL AGREEMENTS IN THE CONTEXT OF DEATH PLANNING.

A. Waivers of Surviving Spouse Rights.

A premarital agreement may also govern the rights of the parties in the event of the termination of the marriage by the death of either party. The agreement may include a partial or complete waiver of all rights that otherwise would be held by a surviving spouse. While both parties to a premarital agreement may agree to waive – in whole or in part – their respective property rights arising at death, often marital agreements will provide substitute "guaranteed benefits" in the event of a party's death during the marriage. These guaranteed benefits can be voluntarily exceeded by either party in their estate plans (and often are). But unlike a will, which can be revoked or amended at any time during a party without a spouse's consent, the premarital agreement creates a binding obligation that must be complied with absent a mutual agreement by both parties.

A release and waiver of "all rights upon death" or equivalent language in a premarital agreement encompasses the waiver of several statutorily granted spousal rights and priorities. These statutory rights and priorities include the right to a spouse's elective share (sometimes referred to as the statutory or forced share), the right to receive the family allowance and exempt property allowance, and the priority to serve as personal representative, executor, or administrator.

B. Status as Surviving Spouse During Divorce Action.

A person who is divorced from a decedent or whose marriage has been annulled is not a surviving spouse. However a decree of legal separation does not terminate the status of husband and wife for death purposes. A husband and wife are considered married regardless of whether a divorce action has been instituted. So, if one spouse dies after a decree of separation has been entered or after a divorce action has been initiated, the survivor will likely have rights as a surviving spouse under most state laws.

A premarital agreement can modify these provisions, stating specifically that a separation decree or the filing of a petition for legal separation or divorce terminates all surviving spouse rights. However, one must take care in drafting such a provision to consider that the divorce proceedings will also automatically terminate upon one spouse's death. If the premarital agreement contains a provision terminating all rights of a surviving spouse once a petition for dissolution of marriage is filed, the surviving spouse will have no rights after a death during the dissolution proceedings. This can lead to very harsh results.

C. Intestate Share of Surviving Spouse.

If a person dies without a will, the decedent's property will be distributed in accordance with the applicable statute of intestate succession. Under many states, the surviving spouse's share of the intestate estate depends on whether the parties have children, separately or together, and whether the decedent is survived by one or both parents. Under the law of many states, the surviving spouse receives the entire intestate estate (1) when the decedent has no surviving descendants or ancestors, or (2) when all

of the decedent's surviving descendants are also descendants of the surviving spouse and there are no other descendants of the surviving spouse who survive the decedent (*i.e.*, it was likely a first marriage for both spouses). The surviving spouse's share tends to be diminished if the decedent had children from other marriages.

D. Spouse's Elective or Statutory Share.

Absent a premarital or marital agreement, a surviving spouse in many states has the right to an elective share of the augmented estate. Uniform Probate Code states, such as Colorado, have adopted a right to elect an amount not greater than 50% of the "augmented estate." Under the Uniform Probate Code, the percentage of the augmented estate to which the surviving spouse is entitled is determined by the length of time the spouses were married, but is essentially as follows:

IF THE DECEDENT AND THE SPOUSE WERE MARRIED TO EACH OTHER:	THE ELECTIVE SHARE PERCENTAGE IS:
Less than 1 year	Supplemental amount only.
1 year but less than 2 years	5% of the augmented estate.
2 years but less than 3 years	10% of the augmented estate.
3 years but less than 4 years	15% of the augmented estate.
4 years but less than 5 years	20% of the augmented estate.
5 years but less than 6 years	25% of the augmented estate.
6 years but less than 7 years	30% of the augmented estate.
7 years but less than 8 years	35% of the augmented estate.
8 years but less than 9 years	40% of the augmented estate.
9 years but less than 10 years	45% of the augmented estate.
10 years or more	50% of the augmented estate.

The augmented estate is comprised of property owned by the decedent at death as well as certain pre-death gifts made by the decedent to third parties (which are pulled back in for purposes of calculating the augmented estate) ***together with*** all assets owned by the surviving spouse.[6] The augmented estate is a statutory concept created to prevent disinheritance of a spouse through transfers to others while at the same time equitably accounting for inter vivos and testamentary transfers to the spouse.

Where families wish to preserve their wealth for future generations, the elective share may disrupt those plans by subjecting the family's wealth to the elective share, thereby losing control of the ultimate disposition of such assets.

E. Priority to Serve as Personal Representative or Executor.

In many states, the priority to serve as personal representative or executor is established by the decedent's will. However, in the absence of a will, or if the will fails to

[6] There is a frequent misconception that the augmented estate refers only to the estate of the decedent, when in fact it comprises the bucket of assets owned by both parties at the time of the first party's death.

nominate someone who can act in such position, the surviving spouse has priority to act. Thus, absent a premarital agreement, if a decedent dies intestate or if all persons nominated in the will fail to qualify, the spouse has priority to serve as personal representative or executor even if that was not the decedent's wish. This priority to serve can be waived in a premarital agreement.

F. Federal Law Rights to Retirement Plan Assets.

The survivorship rights in and benefits under qualified retirement plans are governed by federal law, including ERISA and other provisions of the Internal Revenue Code; it is federal law, and not state law, that governs when and how a participant may obtain a valid waiver of survivorship rights and interests in such plans. A participant in a retirement plan cannot obtain a valid waiver of spousal survivorship rights prior to the parties' marriage. Thus, the general waivers of "all rights upon death" or even a specific waiver of rights to a retirement plan, will not constitute an effective waiver of spousal survivorship rights in a retirement plan. Notwithstanding this fact, premarital agreements often include waivers of surviving spouse rights to retirement assets. These waivers must be coupled with mutual promises to execute separate qualified retirement plan waivers after the parties are married. Note that post-marital waivers are not required for IRAs, as those are not governed by the qualified plan rules requiring a spouse to waive his or her right to be the sole beneficiary.

G. Community Property Waivers.

Generally, community property is owned by both spouses equally. Community property does not include property owned by a spouse prior to marriage, property gifted from one spouse to the other, property inherited by a spouse, or property which was separate property prior to the time the spouses moved to the community property jurisdiction. The titling of property is not determinative of its status. Earned income of the spouses is community property. Income from separate property is community property in some jurisdictions and not in others.

Frequently, parties execute a premarital agreement in one state and move to another jurisdiction. All practitioners should be careful to draft waivers of rights upon death broadly enough to cover rights granted in any jurisdiction and to address the creation (or non-creation) of community property if the parties move to a community property state..

H. Providing for the Survivor in the Event of a Death.

If one or more parties waive their rights as a surviving spouse in a premarital agreement, it often makes sense to build in some guarantees for the survivor in the event of a death during the marriage. In the absence of such guarantees, a party who has waived rights as surviving spouse may be left with nothing if the decedent fails to take care of their estate planning or otherwise chooses to disinherit his or her spouse.

A premarital agreement should not be viewed as a substitute for will or other estate planning documents. Rather, it provides a minimum guarantee for the surviving spouse

(enforceable through a claim against the decedent's estate), which can be exceeded through titling, beneficiary designations, or other estate planning work.

While there are a myriad of possibilities for providing for a surviving spouse in a premarital agreement, the two most basic topics for discussion are (1) whether the surviving spouse should have any rights with respect to the primary residence, and (2) whether one or both parties has a need for financial security or assistance in the form of cash or marketable securities.

- Primary Residence. Common options for a primary residence include the right to remain living there for some period of time, a life estate, an agreement to leave any interest in the primary residence to the survivor outright and free of trust, or the obligation to leave the primary residence in a marital trust for the surviving spouse. At the very least, most surviving spouses want to know that they would be able to remain living in the primary residence for 6 months or a year, in order not to have to make decisions about living arrangements during a period of grief.

- Cash or Marketable Securities. When the wealth of the parties is unbalanced, the more propertied spouse will often agree to ensure that some amount of cash or marketable securities passes to the less propertied spouse. This obligation can be met through life insurance, beneficiary designations, or transfer of assets pursuant to a will or will substitute. Commonly, these assets would pass to a marital trust, rather than outright, so that any remaining assets upon the death of the survivor can return to the descendants of the first spouse to die.

VI. ASSET PROTECTION TRUSTS & IRREVOCABLE TRUSTS CREATED DURING A MARRIAGE: NEW ISSUES IN COLORADO DIVORCES

There are a number of topics arising with increasing frequency in Colorado divorces that estate planning attorney should be aware of, particularly focusing on the transfer of assets to an irrevocable trust during the course of the marriage. Marital agreements may be the best way to protect your clients and your work from the impact of these issues should your clients ever find themselves in divorce proceedings.

A. Separate and Marital Property.

Under the Colorado Uniform Dissolution of Marriage Act, C.R.S. §§14-10-101 et. seq., the property of married people is characterized as either "separate" or "marital" property. In the absence of a mutually signed, written agreement, "separate property" is all property acquired prior to the marriage, and all property acquired by gift or inheritance during the marriage. C.R.S. §14-10-113(2); see also In re Marriage of Blaine, 480 P.3d 691 (Colo. 2021); In re Marriage of Zander, 486 P.3d 352 (Colo. App. 2019). All property acquired in exchange for property owned prior to marriage and property acquired by gift or inheritance is also separate property. C.R.S. §14-10-113(2)(b). All other property acquired during a marriage is marital property, including the increase in value to separate

property and income from separate property. C.R.S. §14-10-113(2) and (4); In re Marriage of Lewis, 66 P.3d 204 (Colo. App. 2003) (interest earned on promissory note is marital property); In re Marriage of McCadam, 910 P.2d 98 (Colo. App. 1995) (interest earned on premarital separate property is marital property). This means that separate property nearly always gives rise to marital property over the course of a marriage, even if it is segregated and held in only one party's name alone, and also means that the contribution of separate property to an irrevocable trust will often result in a loss of marital property appreciation during the marriage.

However, "separate property" and "marital property" are concepts that arise only upon the filing of a petition for legal separation or dissolution of marriage. Until then, a party's rights in property are governed by title, and each party's marital property rights in property held by the other are inchoate or unvested. Questions Submitted by US Dist. Court, 517 P.2d 1331 (Colo. 1974); Love v. Olson, 645 P.2d 861, 863 (Colo. App. 1982)(wife's marital property interest in the appreciation to separate property vests only upon the contingency of divorce or legal separation). As stated by the Colorado Supreme Court in Questions Submitted:

> *[A] husband's property is free from any vested interest of the wife and, with a possible exception or two, he can sell it or give it away. . . . During the marriage, and absent any divorce action, the parties have their separate property and, possibly subject to an exception or two, can dispose of it as he or she desires. . . [In] the dissolution proceeding a wife may be entitled to a division of the husband's property. That right, prior to the dissolution action and possibly subject to an exception or two, is completely inchoate. However, at the time of the filing of the dissolution action in which the division of property will be later determined, a vesting takes place.*

Questions Submitted, 517 P.2d at 1334-35; see also United States v. 9844 South Titan Court, 75 F.3d 1470, 1476-77 (10th Cir. 1996) (under Colorado law, a spouse's right to the other spouse's property does not vest until death or divorce, and until then the person may dispose of their property in any manner), *overruled in part on other grounds by* United States v. Ursery, 518 U.S. 267 (1996).

Nevertheless, family law attorneys are increasingly challenging transfers to irrevocable trusts during a marriage in later dissolution of marriage proceedings, with varying degrees of success.

B. Irrevocable Trusts Created During the Marriage.

The notion that parties can transfer property out of their estates during marriage is typically not controversial. We do it all the time when buying gifts for people and making charitable donations, and the law recognizes this right in both parties. In re Marriage of

Schmedeman, 190 P.3d 788, 791 (Colo. App. 2008)(during the marriage, husband could give away a log cabin as he saw fit, even over wife's objection).

Given that parties remain free to do what they wish with their assets during a marriage, there is generally nothing wrong with the transfer of assets to an irrevocable trust during the marriage, irrespective of who the beneficiaries may be so long as the transfer is "bona fide and not colorable." In re Marriage of Palanjian, 725 P.2d 1167, 1170 (Colo. App. 1986). Bona fide transfers are valid even if the express purpose is to deprive the other spouse of an interest in the property. In re Marriage of Moedy, 276 P. 2d 563 (Colo. 1954). However, transfers that are "illusory" or "colorable" can be set aside.

So what is an "illusory" or "colorable" transfer?

Merriam Webster dictionary defines "illusory" as "not actually being what appearance indicates" and defines "colorable" as "intended to deceive."

Colorado case law does not provide a clear definition of an "illusory" or "colorable" transfer. Some cases indicate that the transfer may be "colorable" if the transfer was not completed until the transferor was either close to filing a divorce or death and the transferor retained a benefit of the property to the detriment of the spouse. See Smith v. Smith, 46 P. 128 (Colo. 1986); Scavello v. Scott, 570 P.2d 1 (Colo. 1977); Grover v. Clover, 169 P. 578 (Colo. 1917). A transferor's exclusive or absolute control over the property that was allegedly transferred may bolster a spouse's claim that the transaction was "illusory" or "colorable." See In re Marriage of Kaladic., 589 P.2d 502 (Colo. App. 1978)(the Court found that Wife's unilateral establishment of a trust eleven months before the dissolution, in which she was the sole beneficiary, was colorable); see also Dahl v. Dahl, 2015 UT 79 (Utah 2015)(the Court set aside a Nevada "irrevocable" trust created during the marriage as void against public policy). However, these cases are contradicted by (or distinguishable on the facts from) Palanjian, Moedy, and Schmedeman, which affirmed the right of a spouse to unilaterally transfer an asset during the marriage, even if it deprived the spouse an interest in the asset at divorce or death.

The difference between a permissible transfer and an illusory transfer can be seen in the two Colorado family law cases involving self-settled trusts: In re Marriage of Kaladic, 589 P.2d 502 (Colo. Ct. App. 1978), and In re Marriage of Pooley, 996 P.2d 230 (Colo. Ct. App. 1999). Eleven months before filing for dissolution of marriage, Mrs. Kaladic transferred assets that had been accumulated during the marriage (*e.g.*, marital property) to an irrevocable discretionary spend-thrift trust. Mrs. Kaladic was the beneficiary, and her lawyer was the trustee. The trust was created by Mrs. Kaladic without her husband's consent because she was worried about his excessive drinking and financial irresponsibility. When wife then filed for dissolution of marriage, the trial court awarded a portion of the trust to Mr. Kaladic, and ordered the trustee to make payment

to him. The Court of Appeals affirmed this result, stating that wife's conveyance of the marital property to the trust was "illusory and fraudulent" against the husband.

In Pooley, the wife had suffered a personal injury during the marriage, for which she had received a settlement. The personal injury settlement was transferred to an irrevocable discretionary trust with wife as beneficiary and her parents as trustees. When the parties later found themselves facing a divorce, the husband argued that the trust assets were marital property to which he was entitled. Although the trial court and the Court of Appeals both acknowledged that personal injury settlements are marital property if received during the marriage, the Court of Appeals held that In re Marriage of Jones compelled the conclusion that wife's interest in the purely discretionary trust was not property, irrespective of the source of funding for the trust.

Although there is no Colorado law supporting the anecdotal information provided below, this author has seen several challenges to trusts created during a marriage where the parties later divorce, even where nothing fishy was going on at the time of trust creation. These issues have arisen:

- Where parties have transferred significant wealth to irrevocable trusts for their children/descendants, but have not retained enough money outside the trusts to maintain both parties' lifestyles after a divorce, clients have complained that they were not advised about this possibility and then turn to their estate planning attorney for answers.

- Where one party creates an irrevocable trust for the benefit of the other spouse and their descendants, but the spouse's beneficial interest is terminated in the event of divorce. The divested spouse then argues (1) they did not know about creation of the trust, or (2) they did not understand (or in some cases even know) about the provision that would divest them from any future interest in assets that were once part of the marital estate. They then argue marital waste or dissipation of assets to address the reduction of marital property as the result of the trust.

- Where the parties have transferred significant assets to an irrevocable trust and one party remains in control of the assets and uses them as if they are his own, the other spouse may argue that some value should be attributed to that use, or that the trust is a sham.

- Where the parties have created a trust during the marriage for asset protection purposes, and one party no longer benefits from the trust while the other does after the marriage.

Estate planners can protect their clients from claims that they improperly transferred assets to irrevocable trusts during a marriage in a variety of ways:

- Ensure that the wealth planning is done by both parties. Although reciprocal trusts may not be possible, if each spouse has created an irrevocable trust and each

spouse has transferred “marital” assets outside the marital estate, it will be much more difficult for one spouse to call “foul.”

- Advise both parties about the estate planning that is being done and have both parties sign off on the plan in writing, indicating their consent to the planning that is being done.

- Address the transfers in a marital agreement where both parties are advised by counsel and they agree to the planning that is being done.