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Family Protection Under the Uniform Probate Code

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FAMILY PROTECTION UNDER THE UNIFORM PROBATE CODE

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The Colorado Legislature recently adopted a modified form of the Uniform Probate Code to replace the multitude of statutes previously constituting the probate system. Mr. Schmidt analyzes present Colorado law protecting the immediate family of the decedent and discusses what the Uniform Code changes mean to the practicing attorney. The treatment, analytical rather than argumentative, provides a realistic appraisal of the two systems.

INTRODUCTION

THE probate laws of all states make some provision for the protection of the immediate family of a decedent. Such laws are designed not only to protect the immediate family by giving them preference over general creditors of the decendent with respect to certain assets, but they are also intended to protect the family from intentional or unintentional disinheritance by the decedent. The law, of course, must strike some balance between the need to protect the immediate family and the desire to protect the creditors of the decedent. The legislature usually decides that certain assets and certain amounts of money represent minimum standards which should be subject to protection in favor of the family. The protection afforded may take different forms depending upon whether the person protected is the spouse of the decedent or one of the decedent's children. The Uniform Probate Code (Code) recognizes the necessity for protecting the immediate family. In some cases, the protection afforded is not significantly different from that already provided by Colorado law. However, in

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other cases such as the elective share of the surviving spouse, the changes are quite drastic.

The Colorado Bar Association Study Committee on the Uniform Probate Code was appointed to consider the advisability of adopting the Code in Colorado. After an extensive effort, a proposed Colorado Probate Code was approved by the Board of Governors of the Colorado Bar Association. Senate Joint Resolution No. 7 of the 1972 Colorado General Assembly[1] directed the Legislative Council to study the Code and the effect that its passage would have on Colorado law. Hearings were conducted with the result that the Colorado Probate Code was proposed in the 1973 session in the form of House Bill No. 1039. At the time this article is being written, the Colorado Probate Code has been approved by the House of Representatives and is awaiting hearings in the Senate Judiciary Committee. Except as otherwise noted, the recommendations of the Colorado Bar Association Subcommittee on Article II were approved by the House of Representatives.

I. CURRENT COLORADO FAMILY ALLOWANCE AND HOMESTEAD EXEMPTION

A. *The Family Allowance*

The present Colorado statutes provide considerable protection for the immediate family of a decedent. These protections primarily take the form of the family allowance[2] and the homestead exemption.[3] Under the family allowance statute, the surviving spouse or minor children of a decedent are allowed to claim $7,500 worth of cash and assets from the estate. The family allowance has been described by the Colorado Supreme Court as a temporary measure "designed to help the widow during the period of administration of her husband's estate."[4] Although early Colorado law limited the benefit to widows, the language of the present statute makes it clear that a surviving husband is also entitled to claim the allowance from the estate of his deceased wife.[5] The allowance is not received automatically. A written application must be filed on or before the

[1] S.J. Res. 7, [1972] Colo. Sess. Laws 653.

[2] COLO. REV. STAT. ANN. § 153-12-16(2)(a) (Supp. 1969).

[3] *Id.* § 77-3-4 (1963).

[4] Wallace v. First Nat'l Bank, 125 Colo. 584, 598, 246 P.2d 894, 901 (1952). *See also* Zackheim v. Zackheim, 75 Colo. 161, 225 P. 268 (1924); Remington v. Remington, 72 Colo. 132, 209 P. 802 (1922); Grover v. Clover, 69 Colo. 72, 169 P. 578 (1917); Deeble v. Alerton, 58 Colo. 166, 143 P. 1096 (1914).

[5] COLO. REV. STAT. ANN. § 153-12-16(2)(a) (Supp. 1969) provides, in part, that "*he or she* shall be allowed to have and retain as *his or her* sole and separate property . . . ." (emphasis added).

date fixed in the notice to creditors as the last date for filing claims.[6] Colorado case law has held that the claim must be under oath and filed within 6 months after the issuance of letters of administration.[7]

The present Colorado statute does not seem to require that the claimant of the family allowance be a Colorado resident. Although earlier cases in this area held that Colorado residence was a prerequisite to a surviving spouse's or minor child's right to claim the family allowance,[8] these cases were decided under earlier versions of the statute which expressly limited the allowance to a "widow residing in this State."[9] In 1953 the statute was amended to avoid any reference to residence within the state,[10] and no subsequent cases on this question have been presented.

The $7,500 allowance may be taken in the form of cash, specific personal property, or any combination of the two. If specific items of personal property are chosen, the court may order an appraisal of the estimated value of the selected property.[11] The allowance was originally designed to give the widow a right to certain articles of personal property formerly belonging to her husband "so that she would not be stripped of the means with which to carry on."[12] A common practice today where the estate is solvent is to take the family automobile, furniture, and personal effects in partial satisfaction of the amount.

Under the present statutory scheme, the family allowance — a fourth class claim — takes priority over the claims of the decedent's general creditors.[13] Where there is insufficient personal property in the estate to provide the entire $7,500, real property in the estate may be sold.[14] However, the family allowance is not superior to a valid mortgage and only the equity may be used to satisfy the allowance.[15] If the estate's

[6] COLO. REV. STAT. ANN. § 153-12-12(1) (1963).

[7] Wigington v. Wigington, 112 Colo. 78, 145 P.2d 980 (1944).

[8] *E.g.*, Lyons v. Egan, 107 Colo. 32, 108 P.2d 873 (1940).

[9] Ch. 109, [1935] Colo. Sess. Laws 398.

[10] COLO. REV. STAT. ANN. § 153-12-16 (Supp. 1969), *formerly* ch. 252, § 211, [1953] Colo. Sess. Laws 673.

[11] *Id.* § 153-12-18 (1963).

[12] Wallace v. First Nat'l Bank, 125 Colo. 584, 598, 246 P.2d 894, 901 (1952).

[13] COLO. REV. STAT. ANN. §§ 153-12-2(1)(e)-(f) (1963).

[14] *Id.* § 153-12-19. *See* Pinnacle Gold Mining Co. v. Propst, 54 Colo. 451, 131 P. 413 (1913).

[15] *See* Bennet v. Reef, 16 Colo. 431, 27 P. 252 (1891). The deficit in the widow's allowance may also be paid out of the rents of the real estate. Logan v. Logan, 11 Colo. 44, 17 P. 99 (1888).

insufficiency to pay the allowance was caused by a gratuitous conveyance by the decedent during his or her lifetime, at least one Colorado case has held that the surviving spouse may not complain of the conveyance since he or she has no right to an allowance during the decedent's lifetime.[16] The right to the family allowance exists regardless of whether the decedent left a will or whether the will was admitted to probate.[17] Similarly, the fact that one claiming the allowance is entitled to a distributive share of the estate has no effect upon the right to the full family allowance.[18] The statute specifically provides that the family allowance shall be exempt from attachment, execution, and other process.[19] The exemption bars only the general creditors of the estate, however, and the allowance is not beyond the reach of the widow's personal creditors.[20] The surviving spouse's right to claim the family allowance may be voluntarily and expressly waived, as in a valid antenuptial agreement[21] or separate maintenance agreement,[22] but the waiver must be clear and specific.[23] Since the right to the allowance vests upon the decedent's death, subject to timely application, the surviving spouse's remarriage does not affect her right to the allowance.[24]

B. *The Homestead Exemption*

If a decedent was possessed of a homestead exemption at the time of his or her death, the surviving spouse or minor children are entitled to the exemption.[25] At present, the statutory amount of the homestead exemption is $5,000. This sum must be paid to the surviving spouse or children from the proceeds of any sale of homesteaded property. The homestead exemption is in addition to the family allowance, and the decedent's beneficiaries other than the spouse have no interest in the homestead of the surviving spouse. The purpose of the homestead law is to "preserve a right of occupancy

[16] Norris v. Bradshaw, 96 Colo. 594, 45 P.2d 638 (1935).

[17] Williams v. Pollard, 101 Colo. 262, 72 P.2d 476 (1937).

[18] *Id.*

[19] COLO. REV. STAT. ANN. § 153-12-16(2)(a) (Supp. 1969).

[20] Wallace v. First Nat'l Bank, 125 Colo. 584, 598, 246 P.2d 894, 901 (1952); Isbell-Kent-Oakes Dry Goods Co. v. Larimer County Bank & Trust Co., 75 Colo. 451, 226 P. 293 (1924).

[21] *See, e.g.*, Maher v. Knauss, 150 Colo. 108, 370 P.2d 1017 (1962); Griffee v. Griffee, 108 Colo. 366, 117 P.2d 823 (1941).

[22] Brimble v. Sickler, 83 Colo. 494, 266 P. 497 (1928).

[23] Bradley v. Bradley, 106 Colo. 500, 106 P.2d 1063 (1940); Deeble v. Alerton, 58 Colo. 166, 143 P. 1096 (1914).

[24] *See* Hale v. Burford, 73 Colo. 197, 214 P. 543 (1923).

[25] COLO. REV. STAT. ANN. § 77-3-4 (1963).

for those who stand in the relation of the head of a family."[26] The surviving spouse becomes the head of the family immediately upon his or her spouse's death, and therefore has a continuing right to occupy the homesteaded property until the amount of the homestead allowance is paid.

II. The Uniform Probate Code Allowances and Exemptions

A. *The Family Allowance*

The underlying premise upon which the family allowance portion of the Code[27] is based is that a surviving spouse should receive a monetary support allowance "off the top" of the decedent's estate in the year following death.[28] Under the Code, the family of a decedent who was domiciled in the state would be entitled to a "reasonable" allowance for maintenance during the period of administration.[29] The purpose of the Code's allowance is the same as that already announced for Colorado's present allowance: to provide support for the family while the estate is undergoing administration.[30] Instead of authorizing a uniform fixed sum to be allowed in all cases, the Code calls for a flexible or "reasonable" amount. In each case a number of factors, including need, would be considered in determining the amount of the allowance.[31] Nevertheless, the Code would impose several limitations on the amount. First, the allowance could not exceed $500 per month or $6,000 per year unless the family member or representative of the estate petitioned the court for a larger amount.[32] In addition, since the family allowance takes preference over claims of general creditors, the court could not continue the allowance for longer than 1 year if the estate were inadequate to discharge allowed claims.[33]

Those entitled to claim the family allowance under the Code would include the surviving spouse, minor children whom the decedent was obligated to support, and children who were in fact being supported by the decedent.[34] Although the Gen-

[26] Wallace v. First Nat'l Bank, 125 Colo. 584, 593, 246 P.2d 894, 898 (1952).

[27] Uniform Probate Code § 2-403 [hereinafter cited as Code].

[28] Report of Colorado Subcommittee on Article II (Intestate Succession & Wills) of Uniform Probate Code (1972) [hereinafter cited as the Colorado Subcommittee Report].

[29] Effland, *Rights of the Surviving Spouse & Children*, Uniform Probate Code Practice Manual § 4.9, at 56 (1972).

[30] *Id.*

[31] Code § 2-403.

[32] *Id.* § 2-404.

[33] *Id.*

[34] *Id.* § 2-403.

eral Comment to Part 4 of the Code expressly provides that the family allowance should be granted only where the decedent was domiciled in the state, it does not require the spouse to be a resident.[35]

If a person entitled to the family allowance dies, his right to any future payment terminates. The family allowance is not reduced by any amount passing by intestate succession nor by the surviving spouse's elective share. Similarly, it would not be charged against any bequest in the decedent's will unless the will expressly provided otherwise.[36]

B. *Exempt Property*

Under the Code, the exemption of the surviving spouse or children for household goods and other personal property is a separate provision from the family allowance provision. Code section 2-402 would permit the surviving spouse or children to select up to $3,500 worth of household furniture, automobiles, furnishings, appliances, and personal effects of a decedent domiciliary. This provision was designed to relieve the personal representative of the duty to sell household chattels when there are family members who would have them.[37] The personal representative would have the power to execute the appropriate documents to establish ownership of the property taken as exempt.[38]

If the selected chattels were encumbered so that their net unencumbered value is less than $3,500, or if the exempt property in the estate does not amount to $3,500, the surviving spouse or children would be entitled to other estate property, including cash, to make up the $3,500 amount.[39] On the other hand, a claimant may be able to choose more than the $3,500 worth of property in certain circumstances. Professor Effland of the Arizona State College of Law gives the following example:

> Suppose that the surviving spouse wishes to select two items of normally exempt property, household furnishings in the amount of $2,000 and an automobile valued at $2,100, none of these items having been specifically devised. The spouse is entitled to exempt property in a value not exceeding $3,500 and the selected items exceed this by $600. However, al-

[35] This appears to be in conformity with present Colorado law. At least one commentator, however, writes that the surviving spouse must be domiciled in the state. Effland, *supra* note 29, § 4.9, at 56.

[36] CODE § 2-403.

[37] *Id.* Art. II, Part 4, General Comment.

[38] *Id.* § 2-404.

[39] *Id.* Art. II, Part 4, General Comment.

> though the Code has no express provision for this situation, there appears to be no reason why the spouse could not select these items by paying to the personal representative the $600 excess. This would in effect be a selection of exempt property in the amount of $3,500 and a sale as to the $600, the personal representative having full power to sell under Article III of the Code.[40]

If there is no surviving spouse, all of the decedent's children (whether or not they are minors or dependents) are entitled to share jointly the entire exemption.[41] Generally, the right to the exempt property is one given in addition to any property passing to the surviving spouse or children under the decedent's will, by intestate succession, or through the elective share.[42] However, by an express provision in the will, a testator may force the spouse or children to take certain property under the will in lieu of any exempt property.[43]

C. *The Homestead Allowance*

Two traditional features of homestead exemptions have been to provide property for the family prior to claims of general creditors and at the same time to provide a portion of the estate which could not be taken away from the family by the decedent's will. The Code retains both of these features in a dollar allowance called a "homestead allowance."[44] The Code suggests an amount of $5,000, but the precise amount is left to the local legislature for determination at the time the Code is adopted. If there were no surviving spouse, the allowance would be divided equally among the decedent's minor and dependent children.[45] The homestead allowance, like the family allowance, is given in addition to any intestate share of a spouse or child, or the elective share of the spouse. It is also independent of any share passing under the decedent's will, unless the will specifically provides otherwise.

D. *Recommendations of the Colorado Bar Association Subcommittee on Article II*

In summation, the provisions of the Code provide three basic protections for the immediate family. The first is a designated homestead allowance of $5,000. The second is a $3,500 exempt property allowance which is related primarily to tan-

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[40] Effland, *supra* note 29, § 4.9, at 59.
[41] CODE § 2-402.
[42] *Id.* § 2-403.
[43] *Id.* § 2-206.
[44] *Id.* § 2-401.
[45] *Id.*

gible personal property. The third is a family allowance of a reasonable amount with a limit of $500 per month or $6,000 per year.

The Colorado Bar Association Subcommittee on Article II of the Uniform Probate Code recommended the adoption of these provisions with certain modifications. The most substantial modification was the combination of the homestead allowance and the exempt property allowance into a single allowance designated as an "Exempt Property Allowance" which is not tied to any particular type of property. This eliminates the present distinction between these two types of allowances relating to real estate and tangible personal property. In addition, it was recommended that the amount of the Exempt Property Allowance be increased to $10,000 to conform with the limits of the present Small Estates Act limit in Colorado.[46] The combination of these two allowances under the Code is $8,500. This means that the provisions dealing with homestead exemptions after death need to be revoked.[47] The provisions dealing with the homestead exemption during lifetime would, of course, not require any modification. Although there was some sentiment that a family allowance of no set sum but merely "a reasonable allowance" was too indefinite, the consensus of the subcommittee was that a flexible standard is desirable. Unfair advantage of such a standard is limited by the necessity for court approval if the amount is to exceed $500 per month or $6,000 per year. The allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. Payment of the family allowance is subordinated to the payment of the exempt property allowance. Rights to exempt property and the family allowance have priority over all claims, including funeral and administration expenses.[48]

III. ELECTIVE SHARE OF SURVIVING SPOUSE

A. *Present Colorado Law*

Almost all states have some form of protection for a surviving spouse against intentional disinheritance. Although some arguments might be made against the advisability of such protection, the concept is very deeply rooted in the historical foundations of probate law. The common law equivalent of this probate protection was dower and curtesy.

[46] COLORADO SUBCOMMITTEE REPORT.

[47] The provisions that need to be revoked are found in COLO. REV. STAT. ANN. § 77-3-4 (1963).

[48] CODE § 2-404.

Notwithstanding the provisions of a testator's will, the surviving spouse has the option to take one-half of the testator's estate.[49] In order to claim this elective share, the surviving spouse must file a written election rejecting the provisions of the will within 6 months from the date the will is admitted to probate.[50] The failure to exercise the option within the 6 month period is conclusive evidence of the consent of the surviving spouse to the provisions of the will. Where an election against the will is made, the electing spouse receives any property which the testator specifically devised or bequeathed to him or her plus enough additional property to equal one-half of the aggregate value of the estate.[51] All classes of property in the estate are subject to the elective share provisions,[52] and the interests of the beneficiaries are abated proportionately insofar as is feasible.[53] The right of a surviving spouse to elect against the will is a personal privilege which does not pass to the spouse's heirs.[54] Furthermore, a surviving spouse's creditors may not compel him or her to make the election.[55] The right to elect may be voluntarily waived before or during marriage by a valid prenuptial or postnuptial agreement.[56]

B. *Problems with Existing Election Provisions*

As a rule, the statutory election may be exercised only against property which was owned by the testator at the time of his death.[57] This has resulted in various schemes to intentionally disinherit a spouse, many of which have proved successful.[58] For example, the decedent may have utilized various "will substitutes" such as joint tenancy, lifetime gifts, funded revocable trusts, and other similar nonprobate arrangements having the effect of reducing the probate estate. Attempts to defeat the rights of the surviving spouse can be successful in Colorado if valid lifetime transfers or other arrangements

[49] COLO. REV. STAT. ANN. § 153-5-4 (1963).

[50] *Id.* § 153-5-4(1).

[51] *Id.* § 153-14-10(1).

[52] Logan v. Logan, 11 Colo. 44, 17 P. 99 (1888).

[53] Hart v. Hart, 95 Colo. 471, 37 P.2d 754 (1934); Binkley v. Switzer, 69 Colo. 176, 192 P. 500 (1920).

[54] Gallup v. Rule, 81 Colo. 335, 255 P. 463 (1927).

[55] Deutsch v. Rohlfing, 22 Colo. App. 534, 126 P. 1123 (1912).

[56] *See, e.g.*, Remington v. Remington, 69 Colo. 206, 193 P. 550 (1920) (postnuptial agreement); Whipple v. Wessels, 66 Colo. 120, 180 P. 309 (1919) (prenuptial agreement).

[57] COLO. REV. STAT. ANN. § 153-5-4 (1963).

[58] *See, e.g.*, Comment, *Defeating the Inheritance of the Surviving Spouse*, 40 MISS. L.J. 286 (1969).

have been concluded by the decedent during his lifetime.[59] Although some of the Colorado cases on this subject have invalidated lifetime transfers on the basis of fraud on the surviving spouse, in those cases there were equally good legal grounds, *e.g.*, lack of effective delivery, for invalidation of the transfer.[60] One Colorado case affirms the right of the owner of property to convey the same without the consent or knowledge of his spouse or other heir, and the mere fact that the conveyance deprives the surviving spouse of the right to inherit this property does not make it fraudulent or invalid.[61] This case goes quite far in preventing the surviving spouse from reaching property transferred during the lifetime of the decedent by ruling that a deed must be executed before the grantor's death but delivery may be after the grantor's death, even where there is a reservation of a life estate to the grantor, provided it was the intent of the grantor at the time of execution of the deed to pass a present interest in the property with mere postponement of the possession or enjoyment of the property.

C. *Solution of the Uniform Probate Code*

Article II, Part 2 of the Code, provides for the elective share of the surviving spouse. This is possibly the most controversial provision of the entire Code. In Michigan, which has adopted the Code, the controversy over this provision reached the point where all statutory protection against disinheritance of a spouse was completely eliminated.[62]

The Code provides that, if a married person domiciled in the state dies, the surviving spouse has a right of election to take a share equaling one-third of the "augmented estate" of the decedent.[63] The Colorado Subcommittee has recommended that the elective share be increased to one-half of the augmented estate to conform with existing Colorado law.[64] It is the concept of the augmented estate which presents the controversy with respect to the elective share provisions. As has been seen, it is often possible for a decedent to inten-

[59] *See* Rea, *Election to Take the Statutory Share*, 29 ROCKY MT. L. REV. 506 (1957).

[60] Wolfe v. Mueller, 46 Colo. 335, 104 P. 487 (1909).

[61] Thuet v. Thuet, 128 Colo. 54, 260 P.2d 604 (1953).

[62] This is especially surprising in view of the fact that Professor Richard V. Wellman, Chief Reporter for the Uniform Probate Code, is a Professor of Law at the University of Michigan Law School and was one of the prime movers behind the Michigan probate revision.

[63] CODE § 2-201.

[64] COLORADO SUBCOMMITTEE REPORT.

tionally disinherit a surviving spouse by various nonprobate techniques.[65] Conversely, a surviving spouse can, under some circumstances, receive more of the decedent's estate than might seem equitable. For example, a surviving spouse may have been amply provided for by the decedent through life insurance, a living trust, outright gifts by the decedent during his lifetime, or acquisition of property in joint tenancy, and still elect to receive a share of the probate estate. It is the purpose of the augmented estate concept to prevent both types of inequity.[66]

The augmented estate is defined in section 2-202 of the Code and is computed on the basis of three elements. The beginning point is the probate estate reduced by funeral and administration expenses, the homestead allowance, family allowances and exemptions, and enforceable claims. The second element consists of property transferred by the decedent during marriage to persons other than the surviving spouse. The third element consists of property which has been transferred by the decedent to the surviving spouse. The first element is fairly easily computed. The complexities arise with respect to the second and third elements.

The last two elements described above are added to the first element. In other words, certain transfers by the decedent during lifetime must be added to the net probate estate in computing the augmented estate. Only lifetime transfers for which the decedent did not receive adequate and full consideration in money or money's worth are to be added back in computing the augmented estate.[67] The lifetime transfers which are added back must come within certain defined categories. First, if the decedent makes a gratuitous transfer and retains at the time of his death the possession or enjoyment of, or right to income from, the property, then the property is added to the augumented estate. Second, there are included all properties to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke, to consume, to invade, or to dispose of the principal for his own benefit. Third, any property, transferred so as to be held at the time of the decedent's death by decedent and another with right of survivorship, is added to the augmented estate. This would include joint

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[65] Denver Nat'l Bank v. Von Brecht, 137 Colo. 88, 322 P.2d 667 (1958).
[66] Effland, *supra* note 29, § 4.4, at 47.
[67] CODE § 2-202(1).

tenancy and tenancy by the entirety, but joint annuities are specifically excluded. Finally, there is added to the augmented estate any gratuitous transfer made by the decedent within 2 years of death, excepting gifts of $3,000 or less in each of those years to any one donee. Contemplation of death is not a factor with respect to such gifts, so proof of motive is immaterial. Life insurance, accident insurance, or pensions payable to a person other than the surviving spouse are not included in the augmented estate. In computing the augmented estate, there is added to the net probate estate all property falling within any of the above categories, whether such transfers were made to the surviving spouse or to some other person.[68]

In computing the augmented estate against which the election is made, we have so far discussed two basic steps. The first of these involves computing the net probate estate in the hands of the personal representative. The second step involves adding to the net probate estate certain types of property transfers made by the decedent during lifetime regardless of the transferee. This means that the surviving spouse must include in the augmented estate all property which he or she owns at the decedent's death to the extent that it is derived from the decedent other than by will or intestate succession. The spouse must account for all such property even though he or she may have already transferred it at the decedent's death to someone else. This presents obvious problems of tracing. Property owned by the surviving spouse at the decedent's death or transferred by the spouse during the decedent's lifetime is presumed to have been derived from the decedent except to that extent that the surviving spouse establishes that it was derived from another source.[69] The property owned by the surviving spouse which was derived from the decedent is included in computing the augmented estate, but it also reduces the amount of property which must be contributed by others in satisfaction of the elective share of the spouse.

As a very simple example of the operation of this complicated concept, assume that we have an augmented estate of $300,000. Let us further assume that the augmented estate consists of a net probate estate in the amount of $100,000, plus property having a value of $100,000 which was owned by the decedent and the surviving spouse as joint tenants at the time

[68] *Id.*
[69] *Id.* § 2-202(3)(iii).

of the decedent's death, and an additional $100,000 which was in a revocable living trust created by the decedent during his lifetime. Suppose the decedent's will bequeaths everything to his daughter and the living trust terminates with the remainder being payable to decedent's son. Under the Colorado Subcommittee recommendation, the surviving spouse would be entitled to an elective share of one-half of the augmented estate or $150,000. The surviving spouse would be required to account for the $100,000 which she received as a surviving joint tenant. The joint property would partially satisfy the elective share. The next problem is the source of the additional $50,000 to which the surviving spouse is entitled as a result of the election. The balance of the elective share is payable out of the remaining property of the augmented estate, without distinction between probate and nonprobate property. The liability for the balance of the elective share is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.[70] This means that the son and daughter would each be required to contribute $25,000 to the surviving spouse. Depending upon the nature of the assets received under the will and trust, contribution by the son and daughter should not present a serious problem since they would have on hand the assets from which payment to the surviving spouse could be made. Any person who is liable for contribution may choose to give up the property received by him or pay its value as of the time it is considered in computing the augmented estate.[71] Property is valued as of the decedent's death except for property given irrevocably to a donee during the lifetime of the decedent which is valued as of the date the donee came into possession or enjoyment of the property.[72]

A more difficult problem arises where property transferred during the decedent's lifetime is brought back and added to the augmented estate. The transferee is subject to contribution for his proportionate amount of the elective share even though he may no longer own the transferred property. Assume a deceased parent has given his son $10,000 with which to take a trip to Europe within 2 years of the date of death. The son would be liable to contribute to the elective share. A real hardship would exist if the amount of contribution

[70] *Id.* § 2-207(b).
[71] *Id.* § 2-207(c).
[72] *Id.* § 2-202(2).

of the son was very large and he did not have means of his own with which to make the contribution. The tracing problem in cases involving lifetime transfers is potentially compounded because a donee of the transferee is liable for contribution to the elective share to the extent the donee still has the transferred property or its proceeds at the decedent's death.[73]

The right of the surviving spouse to elect may be waived by a written contract signed after fair disclosure. This contemplates the utilization of a prenuptial agreement or postnuptial agreement. In addition, any property transferred during the lifetime of the decedent is excluded from the computation of the augmented estate if it was made with the written consent or joinder of the surviving spouse.[74] This presents a valuable estate planning tool in that it allows an individual to assure against an election by his spouse with respect to any specific lifetime transfer by having the spouse join in the transfer.

The election to take the elective share is made by filing with the court, and mailing or delivering to the personal representative of decedent, a petition within 6 months after the publication of notice to creditors. The Colorado Subcommittee felt that this language in the Code is somewhat indefinite and recommended that the petition be filed within 6 months after the *first* publication of the notice to creditors.

Under the Code, the surviving spouse is permitted to renounce any items that would otherwise be taken under the decedent's will or by intestate succession and thus avoid having to accept property specifically devised or bequeathed or taken by operation of law.[75] This is inconsistent with present Colorado law which provides that the court shall order the distribution to the surviving spouse of the property specifically devised or bequeathed to him by the testator together with such additional property as will equal one-half of the testator's estate.[76] The Colorado Subcommittee saw no compelling reason to change the existing law, and recommended changing the Code to this extent. The legislature agreed that existing law is preferable and deleted the provision of the Code permitting the surviving spouse to renounce any items that would otherwise be taken under the decedent's will or by intestate succession.

[73] *Id.* § 2-207(c).
[74] *Id.*
[75] *Id.* § 2-206(a).
[76] COLO. REV. STAT. ANN. § 153-14-10 (1963).

IV. Omitted Family Members

A. *The Omitted Spouse*

Present Colorado law provides that the subsequent marriage of a testator revokes his will unless a contrary intention is expressed in the will.[77] The Code provides that a subsequent marriage does not revoke a will, but a surviving spouse who was not provided for in such a will is entitled to an intestate share unless the will shows the omission to be intentional or the testator provided for the spouse by a transfer outside the will with the intention that such transfer be in lieu of a testamentary provision.[78] This approach is deemed preferable to having the will revoked by the subsequent marriage, while preserving for the surviving spouse a share of the estate. The effect of this provision is perhaps to reduce the instances where a spouse will claim an elective share.

B. *Pretermitted Children*

Under the present Colorado statute, a will is not revoked by the subsequent birth of a child.[79] However, unless it shall appear by the terms of the will that it was the testator's intention to disinherit a subsequently born child, that child is entitled to an intestate share.[80] The Code follows the same basic rule and includes adopted children.[81] The reference to adopted children is an extension of the Colorado law. However, a subsequently born or adopted child shall not receive an intestate share if it appears from the will that the omission was intentional. In addition to express omission, an intestate share is not given where the testator had one or more children at the time the will was executed and devised substantially all his estate to the other parent of the omitted child.[82] Finally, if the testator has provided for the omitted child by a transfer outside the will, and if the intent that this transfer be in lieu of a testamentary provision is shown by statements of the testator or other evidence, then an intestate share is not awarded.[83] If the testator fails to provide in his will for a living child because he believes that child to be dead, the child receives an intestate share.[84] The Code permits oral evidence

[77] *Id.* § 153-5-3.
[78] Code § 2-301.
[79] Colo. Rev. Stat. Ann. § 153-5-6 (Supp. 1965).
[80] *Id.* § 153-5-6.
[81] Code § 2-302.
[82] *Id.* § 2-302(a)(2).
[83] *Id.* § 2-302(a)(3).
[84] *Id.* § 2-302(b).

to establish a testator's intent that lifetime gifts or nonprobate transfers such as life insurance or joint accounts are in lieu of a testamentary provision for a child born or adopted after the will.

CONCLUSION

The provisions of the Uniform Probate Code providing for the protection of the surviving spouse and children of a decedent are not different in theory from the practice which has existed in Colorado in the past. The approach is only slightly different with respect to the exemptions and allowances. The most significant change is with respect to the election of the surviving spouse to take against the will. Although the provisions are very complex and possibly conducive to much litigation, the method of ascertaining the proper elective share of the spouse is much more consistent with the basic theory of preventing intentional disinheritance. It is not often that elections are made against the will, but the recommendations of the Code would seem to provide a more honest solution in those cases where the election is made.

POSTSCRIPT

Subsequent to the completion of this article, the Colorado Legislature enacted a modified form of the Uniform Probate Code, which will take effect July 1, 1974. Due to two last minute changes in the Code prior to final enactment, certain points made in this article need to be clarified. First, the Code as finally passed made the amount of the Exempt Property Allowance $7,500, instead of $10,000 as was recommended by the Colorado Bar Association Subcommittee on Article II of the Uniform Probate Code. Second, it was provided that a spouse can elect to take one-half of the augmented estate or, in the alternative, one-half of the inventoried estate. This preserves the current Colorado election and grants a new form of election. However, because of this change, the form of inequity which was sought to be eliminated by the augmented estate concept, whereby a spouse who has been adequately provided for during the decedent's lifetime may still elect to take one-half of the inventoried estate, still exists under the Code.