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NOTES FROM THE EDITOR

The Trust & Estate Section is committed to maintaining the high quality of this newsletter and will continue to publish articles on substantive legal matters as well as information about the activities of the Section's various committees. Please feel free to contact the *Council Notes* Editor, Jennifer M. Spitz at 303-776-5380 or jspitz@flanderslaw.com with proposed articles or announcements and other comments, criticisms, or suggestions.

WHAT'S INSIDE?

ARTICLES

NOTICES

THE NEED TO EVALUTATE COMPETENCIES

By Dr. Richard F. Spiegle and Specer J. Crona

When questions or concerns about a person's testamentary, contractual or functional capacity arise, they can and do create havoc within a family. This article explores recent concepts of legal capacity in the probate context and how conditions affecting capacity might be evaluated.

Testamentary Capacity

Under the Colorado and U.S. constitutions, and the Colorado Probate Code, we all have the individual right to dispose of our personal assets and property as we choose, regardless of age or choice of beneficiary, provided we are possessed of "sound mind." Thus, a testator "may indulge his prejudice against his relations and in favor of strangers . . . " as he desires.[1]

Capacity to contract and capacity to execute a will relate to the individual's competencies to make decisions about the management and disposition of his or her financial assets. These are special instances of the capacity to care for one's property, and assessing such capacities accordingly may require specialized methods. Unfortunately, the evaluation of a person's testamentary capacity (which can apply where people, as they may, choose estate planning through various contractual instruments as alternatives to wills) is often done postmortem, through review of medical records that often leave too many unanswered — and perhaps unanswerable — questions. In such cases, a forensic evaluator may be asked to opine retrospectively about the individual's competency on the basis of medical records, other records, documents written by the deceased, recollections of friends or associates and the circumstances of execution of the instrument in question. Regrettably, postmortem forensic evaluation of testator capacity frequently becomes a complex aspect of contentious and costly estate litigation, perhaps fostering the observation, "A will is a terrible thing to waste."

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DENVER PROBATE COURT UPDATE

BY JUDGE C. JEAN STEWART

Recently the Colorado Judicial Branch introduced a new format for its website. Shortly, the Denver Probate Court will join the other Colorado courts with a new web master, Sandra Franklin, and an improved format. We plan to make increased use of our website in the future in our effort to communicate with the probate bar and the public. Find us at www.cobar.org/probate.ct/index.htm.

All of the Colorado Probate Code forms are now for sale in our clerk's office (Room 230, City and County Building). We have formatted all of the forms for use in the Denver Probate Court and sell individual forms at 50¢ to $3 each, depending upon the number of pages in the form. We continue to sell packets for pro se litigants and our Personal Injury Settlement packet for attorneys; most packets are priced at $10.00.

Beginning in 2001 the Denver Probate Court has adopted a policy of mandatory mediation in all contested guardianship and conservatorship proceedings. The program has been exceptionally successful, resulting in more settlements than trials so expect to receive a Court Order to Mediate before you go to trial on the merits.

Welcome the new Denver Probate Court Registrar, Linda Riggle. Linda has been with the Denver Probate Court for many years and is familiar to many practitioners in the probate bar. Linda has recently instituted a program of reviewing informal applications and (if appropriate) issuing Letters while you wait. We hope busy practitioners will appreciate this service.

We continue to utilize many volunteers in our Information and Referral Office. At present we have enough volunteers to staff the office two mornings a week. We would very much like to add one afternoon a week. If you would like to volunteer to help the Court, assist the public, or gain some additional experience with probate and protective proceedings, email Linda Pero (linda.pero@judicial.state.co.us) about this and other volunteer opportunities.

You have undoubtedly heard about the budget crisis facing Colorado. It is deeply felt in our Court where we are presently operating on a mandatory furlough program. Because we are already staffed at minimal levels, losing every employee one day per month is sorely felt in our court. Additional budget cuts would mean shortening hours and curtailing services. If you have influence with the branches of government that control the financial resources, use that influence to keep the courts open and operating.

One of the ways we are addressing the budget crisis is to encourage attorneys to use the new efiling system. Denver Probate Court has been selected as a model court for the development of nationwide best practices for efiling procedures in probate cases. To that end we have committed to have all outgoing orders served by CourtLink by December 31, 2002. We particularly appreciate your filing pleadings electronically to help us in this transition.

ORGAN DONATION

BY PETER C. WOLK

A major cause of the shortage of organs is that regardless of a decedent's wishes, virtually no surgeon will take organs or tissue without permission from the family. Regrettably, family members often withhold authorization because they are unaware the decedent wished to donate organs and tissues, thereby frustrating organ donors' wishes.

In fact, a national study conducted by Gallup indicates that when family members know of their loved one's wishes, 94% will honor the request. But, when family members do not know, only 54% will donate the relative's organs. Indeed, of all the causes for organs being unavailable from people who wanted to be donors, 37% are lost due to the family's refusal to consent. Those lost organs (from people who wanted to be organ donors!) could save many lives.

Attorneys are uniquely positioned to help by asking clients during estate planning and Will intake sessions if they want to be organ donors and if they have told their family. (Whether someone decides to be or not to be an organ donor is a personal decision that is respected; the purpose here is to ensure that people who want to make anatomical gifts do not have their wishes thwarted.) Sharing the decision to be an organ donor also has the effect of sparing surviving family members from the difficulty of having to make a burdensome, personal decision at an emotional time.

The American Bar Association supports more client education about organ donation issues:

> RESOLVED, That the American Bar Association urges all attorneys to raise with their clients, when appropriate, the topic of organ and tissue donations and to provide donation forms to those clients who indicate an interest in making a donation.

Summary of Action of the House of Delegates, American Bar Association 1992 Mid-Year Meeting, Dallas, Texas, p. 30 (February 3-4, 1992). (Full text of the Resolutions and additional organ donor information is printed in the ABA pamphlet: "A Legacy for Life" (free on the ABA website; $12/100 pamphlets in print).

As a lawyer, you can help by asking your clients the following questions during Will intake interviews:

(1) Do you wish to be an organ and tissue donor?

Self	Yes _____	No _____
Spouse	Yes _____	No _____

(a) If yes, have you signed an organ donor card or indicated on your driver's license your intent to be an organ and tissue donor?

Self	Yes _____	No _____
Spouse	Yes _____	No _____

(b) Have you told your family about your intention to be an organ and tissue donor?

Self	Yes _____	No _____
Spouse	Yes _____	No _____

 Mr. Wolk is working on a lawyer education outreach project for the U.S. Division of Transportation. This article is adapted from articles published in the D.C. Bar, Texas Bar, and the Elder Law newsletters.

EVALUTATE COMPETENCIES CONTINUED FROM PAGE 1

When a court invalidates a will, that can amount to a direful waste of a precious opportunity to establish and enforce a person's last right of passage. Making a valid will actually requires relatively basic competency and can be a straightforward task when properly handled. At minimum, the Colorado Probate Code mandates that a testator may write a valid holographic will, provided that "material portions" are rendered in the testator's handwriting and the testator signs it.[2] Other provisions of the Code describe the features of those instruments that may be deemed "writings intended as wills,"[3] while others prescribe the elements of a will presumptively valid on its face, without evidence extrinsic to the instrument itself.[4] All of those methods of expressing testamentary intent depend for validity on the overriding prerequisite that the testator must be age 18 or older and possessed of sound mind.[5]

As to defining "sound mind," the Colorado Supreme Court held forth on that issue in an eminent 2000 case, *Breeden v. Stone.*[6] In that opinion, the Court essentially merged what previously had been two standards for the legal determination of sound mind, known as the "*Cunningham* Test"[7] and the "Insane Delusion Test."[8] The Cunningham standard for sound mind comprises five elements: the testator (1) understands the nature of his or her act in making a will, (2) knows the extent of his or her property, (3) understands the proposed testamentary disposition (how the will would dispose of that property), (4) knows the "natural objects of his or her bounty" (his or her natural heirs) and (5) understands that the will represents his or her wishes. "Insane delusion" might be described as a "negative" standard – what sound mind for testamentary purposes is <u>not</u> – in that it refers to "a persistent belief," which materially affects the preparation or dispositions of the will, "in that which has no existence in fact and which is adhered to against all evidence."[9] Thus, even a considerable degree of eccentricity does not necessarily indicate that the testator is incapacitated for testamentary purposes, nor will such delusions if they do not affect how the testator disposes of property by will.

What the Colorado Supreme Court concluded was that the two standards for determining sound mind were not mutually exclusive. *Cunningham* applied, for example, to cases where pervasive mental illness, cognitive or physical infirmity, or dementia affected the making of the will; "insane delusion" applied, for example, to cases where paranoiac or schizophrenic delusions affected the making of the will. Influence of prescribed or illicit medications might play into the factual circumstances for application of either standard. For Colorado, the *Breeden* Court enunciated the consolidated rule that sound mind "includes the presence of the *Cunningham* factors <u>and</u> the absence of insane delusions that materially affect the will . . . ."[10] (Emphasis in original.)

Colorado's Probate Code confers a presumption of validity upon a will prepared and executed within statutory norms, either by compliance with the "self-proved" will statute, or by proofs of writings and due execution as an intended or holographic will.[11] Consequentially, a disappointed (legitimately or not) heir or beneficiary can challenge a will chiefly on the ground that the testator lacked testamentary capacity at the time of the making of the will, as a result of an identifiable cognitive or physical disorder, or on the ground that he or she was extraordinarily susceptible to duress or deception and indeed was impelled by such "undue influence" or fraud at the time of execution of the will.

Accordingly, the issue of sound mind can be raised in either the context of testamentary capacity or susceptibility to exploitation, but more than mere identification of mental disorder is required to invalidate a will. Mental illness alone is not equivalent to testamentary <u>in</u>capacity. A person with a mental-illness diagnosis may make a valid will, as may an individual addicted to narcotics or alcohol, or even an individual who at the time of execution of the will is emotionally overwrought and has a history of substance abuse,[12] but such a conclusion might be the outcome of protracted and expensive litigation. For those who choose instead, for whatever personal reasons, to err on the side of caution, the best way to protect against family misunderstanding, diagnostic ambivalence and a potentially acrimonious will dispute is to engage a trained and experienced forensic examiner to evaluate the testator for the purpose of a determination as to his or her competency.

<u>Conservatorship and Guardianship</u>

With respect to evaluating the potential "incapacitated person" outside the testamentary scenario, there may come a time in a person's life when he or she is no longer capable of self-care. The person may become confused about what comes into the home through the mail. The person may forget when to take what of various medications that have been prescribed. The person may no longer be safe in the home. The person may need the assistance of a court-appointed guardian or conser-

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vator, whether the person desires such appointment or not.

As the result of statutory enactments effective as recently as January 2001, the legal requirements for finding that an incapacitated person needs appointment of a guardian or conservator have been raised. No longer can a doctor scrawl a brief note on a prescription pad stating that an individual is not competent or needs a guardian. Details must be sufficiently specified to reveal the individual's functional strengths and weaknesses with respect to "Activities of Daily Living" to determine whether the individual is "…unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonable available technological assistance."[13]

Put differently, "The construct of incompetency to care for self and/or property is not merely a question of the absolute level of functional deficit caused by physical or mental disability. The individual's capacities must also be described and considered in relation to the demands of living arrangements and personal financial circumstances."[14] One of the court's objectives is to determine the degree of discrepancy between the person's abilities and these situational demands. The type and degree of abilities perceived as necessary to care for property will depend upon the size, type and complexity of the estate. The inability to manage one's estate often exists not because of changes in the elderly or infirm person's functioning, but rather because of changes in property or income, to which the person might not have the capacity to adjust. In some such cases, in consideration of the person's discrete abilities, a limited guardianship or conservatorship is appropriate as opposed to an all-or-nothing conceptualization of incompetence. Indeed, Colorado's new Uniform Guardianship and Protective Proceedings Act (CUGPPA) reflects that emphasis on "tailoring" the limited appointment to the person's circumstances.[15]

Today, a broader definition of incapacity forms the basis for guardianship and conservatorship proceedings. The 22-month-old CUGPPA set forth a more comprehensive definition of "incapacitated person" than was the case in the past (see statutory definition above), compared to the much narrower definition of testamentary capacity. The CUGPPA emerged, in part, from a re-emphasis on the preservation of individual rights and the concomitant perception of guardianship or conservatorship as a last resort. The law favors limited appointments whenever possible, places the burden of proof on the petitioner to show otherwise, and fortifies due-process safeguards, such as right to counsel, professional evaluation and appearance at hearing.[16] Perhaps most significantly, the new law departs from previous law in that it requires evaluation of specific functional aspects of capacity and provides for the court-ordered evaluation of mental and physical condition, educational potential, adaptive behavior, prognosis for improvement and recommendations for rehabilitation. The law mandates qualifications for such an evaluator and effectively declares the global opinions of health care providers, family members and others, as inadequate for this objective.[17]

In keeping with the *limited* conservatorship or guardianship concept as the "least restrictive alternative," the court will order only those powers made necessary by the individual's limitations and *demonstrated* needs, which cannot be compensated for through appropriate technological assistance.[18]

In summary, the CUGPPA mandates a more comprehensive and careful approach to assessment of incapacity, based upon an individual's day-to-day *functional* abilities and limitations pertinent to the specific capacity in question.

Methods of Evaluation

Traditionally, competence or capacity has been evaluated by one or more of the following methods: physician report based on global impressions derived from formal diagnosis or observation of the individual in the office setting; self-report of the individual of his or her own abilities; and report by family, friends, or caretakers, of their observations of the individual's day-to-day functioning in his or her own environment.

More recently, structured checklists or other instruments identifying discrete, practical skills necessary to daily living have been administered, usually by a mental health or other health care specialist, with each skill rated as to adequacy based upon one or more sources of information, which may or may not include observation of the individual in the naturalistic setting. Other psychological tests such as IQ tests, diagnostic inventories, or neuropsychological assessments have also been used to make inferences as to competence in daily living based on IQ scores, psychiatric diagnosis, or cognitive impairment. Formal tests such as these yield a formal but global diagnosis such as intellectual or cognitive impairment, or mental illness. However, a diagnosis indicating illness or disorder is not synony-

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mous with incapacity, nor does it necessarily present an accurate picture of a person's functioning on a day-to-day basis, or ability to care for basic needs, or execute a will. The evaluator making such a formal diagnosis would need to assess further how such an illness affects this particular individual on a day-to-day basis, in reference to particular skills or tasks of concern and, in a legal proceeding, in reference to the relevant legal standard.

Current standards of assessing competence, as recommended by psychologists and other forensic examiners, have developed in parallel with the law, and are quite consonant with Colorado law in particular. The concept of competence as an "either-or" characteristic is rejected in favor of the view that there are multiple, discrete competencies in reference to specific tasks of daily living. This concept is referred to as *functional competence* and encompasses the discrete, practical skills involved in caring for one's self, in managing one's own property and personal affairs, or in living independently. These skills or abilities are referred to as *activities of daily living* (ADLs) and are defined in reference to the environmental or situational demands faced by the individual being evaluated. Upon identifying limitations or a mismatch between abilities and life circumstances, an effort is made to determine whether the limitations are remediable and/or whether adaptations are available that may compensate for the limitations. The emphasis of the evaluation is on direct, objective observation and measurement of the individual's ability to function in daily life (i.e., ADLs) in the individual's home environment.

There are a variety of instruments available for the assessment of ADLs, and they are fairly uniform in terms of the specific ADLs assessed, as reflected in the following categories. Each measures the multiple discrete skills comprising that category:

- ❖ Sensory-motor functioning
- ❖ Memory
- ❖ Money management
- ❖ Home management
- ❖ Use of transportation
- ❖ Health and safety
- ❖ Social adjustment
- ❖ Problem-solving ability
- ❖ Ability to learn new tasks

Quite sophisticated instruments to assess ADLs are available now that meet psychometric standards (i.e., standardization, validity and reliability of data, and appropriate normative data), such as the Independent Living Scales, which are administered by a qualified mental health specialist or forensic examiner.[19]

The ADL assessment is crucial but typically done in the context of a comprehensive evaluation that may also include a clinical and diagnostic interview, mental status exam, review of medical and other records, and input from collateral sources such as family and caregivers. Additional formal psychological testing may also be included if indicated.

Ideally, in the case of testamentary capacity, some form of competency assessment might be routinely performed at the time of execution of a will, perhaps as part of a general medical evaluation. Most especially in the context of a large or complex estate, such assessment might be performed to address any questions of capacity at the time of execution, or in consideration of reasonable suspicion that a will contest will ensue upon the death of the testator.

Competency evaluations can be important to transactional validity in a variety of testamentary, contractual and personal-care situations. Trouble might be avoided by enlisting the services of a forensic competency evaluator, applying modern functionally oriented methods, as a precautionary measure during estate planning and related legal matters. Like many senior citizens, "Better safe than sorry" is a vintage, yet vibrant, maxim.

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[1] *Lehman v. Lindenmeyer,* 48 Colo. 305, 109 P. 956 (1909).

[2] C.R.S. Section 15-11-502.

[3] C.R.S. Section 15-11-503.

[4] C.R.S. Section 15-11-504.

[5] C.R.S. Section 15-11-501.

[6] 992 P.2d 1167.

[7] *Cunningham v. Stender,* 127 Colo. 293, 255 P.2d 977 (1953).

[8] *Hanks v. McNeil Coal Corp.,* 114 Colo. 578, 168 P.2d 256 (1946).

[9] *Breeden, supra; see, also, Hanks, supra.*

[10] *Breeden, supra.*

[11] C.R.S. Section 15-11-504; C.R.S. Section 15-11-503; and *see, e.g., Matter of Grobman's Estate,* 635 P.2d 231 (Colo.App. 1981). Note that proponents of a will bear the burden of establishing prima facie proof of due execution, while contestants of a will bear the burden of proof as to lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation, pursuant to C.R.S. Section 15-12-407.

[12] *Breeden, supra.*

[13] C.R.S. Section 15-14-102 (5).

[14] Grisso, Thomas, Ph.D., Evaluating Competencies: Forensic Assessments and Instruments (Plenum Press: New York, 1986).

[15] *See, e.g.,* C.R.S. Section 15-14-304(2)(h) and Section 15-14-403(3)(c), requiring affirmative showing to the court of why a limited, as opposed to an unlimited, appointment of guardian or conservator, respectively, is "inappropriate."

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[16] *See, e.g.,* C.R.S. Section 15-14-308.
[17] C.R.S. Section 15-14-306.
[18] C.R.S. Section 15-14-102(5); C.R.S. Section 15-14-401(1)(b)(I).
[19] Loeb, 1996.

Dr. Richard F. Spiegl, is a Clinical and Forensic Psychologist in practice in Denver. Dr. Spiegle has been qualified as an expert in Forensic Psychology in District, County and Probate Courts throughout the state of Colorado, and in Nebraska, as well to offer expert opinions in the fields of capacity and competency evaluation in criminal, civil and domestic proceedings. Dr. Spiegle is a licensed Clinical Psychologist and is Board Certified in Forensic Psychology by the American Board of Forensic Examiners. He can be reached at 303-837-0776.

Spencer J. Crona is an attorney with R.L Steenrod, Jr. & Associates, P.C., and the Office of the Denver Public Administrator. Spencer Crona has practiced law in Colorado for 13 years, chiefly in the fields of estate administration, conservatorships, guardianships and probate litigation. He was a member of the CUGPPA drafting subcommittee of the Statutory Revisions Committee. He can be reached at 303-534-5100.

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The views expressed in this article are the authors' alone and do not necessarily represent the views of Richard F. Spiegle, Psy.D., P.C., R.L Steenrod, Jr. & Associates, P.C., or the Office of the Denver Public Administrator.

THE DIVORCE REVOCATION STATUTE REVISTED

BY THOMAS L. STOVER OF FLANDERS STOVER ELSBERG LLP

The September issue of Council Notes contained an article entitled "Survivors Beware!" That article discussed conflicting decisions by the Colorado Court of appeals as to whether C.R.S. §15-11-804(2) (the divorce revocation statute) is constitutional in application to life insurance beneficiary designations made before that statute was enacted. The article mentioned that at the time of publication Writ of Certiorari had been granted by the Colorado Supreme Court in both of the conflicting Court of Appeals decisions. The Supreme Court has since issued an opinion upholding application of §15-11-804(2) to beneficiary designations made prior to the enactment of the statute. *In re Estate of Dewitt,* 54 P.3d 849 (Colo. 2002).

The Court held that §15-11-804(2) was intended to be retroactive, but was neither unconstitutionally retrospective nor an unconstitutional impairment of contract. The Court reversed the Court of Appeal's decision in *Hill v. Dewitt*, 32 P.3d 550 (Colo.App. 2000) and affirmed the Court of Appeal's decision in *Fasi v. Becker*, 32 P.3d 559 (Colo.App. 2000).

The Dewitt Supreme Court held in pertinent part, as follows:

> We hold that section 15-11-804(2) may be applied retroactively to revoke revocable rights granted during a marriage that dissolved before the statute became effective and where the insured ex-spouse died after that effective date.

Section 15-11-804(2) applies to a broad array of dispositions, appointments and provisions made by divorced individuals to former spouses in governing instruments or created under law. The Supreme Court's ruling is probably broad enough to encompass all of these relationships under its umbrella of constitutionality.

Note, however, that Dewitt did not address the issue of ERISA preemption of the divorce revocation statute. *See Estate of MacAnally*, 20 P.3d 1197 (Colo.App. 2000) and *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S.Ct. 1322 (2000).

MEDICAID PLANNING UPDATE

BY RICHARD B. VINCENT OF RIDGWAY, ROMEO & VINCENT

Court of Appeals Holds that Elective Share Trust Statute Will Not Shelter Assets for Medicaid Eligibility Purposes

The Colorado Court of Appeals recently held in *In the Matter of the Estate of John G. Faller v. Colorado Department of Health Care Policy and Financing,* Colo. App. LEXIS 1197 (Colo. Ct. App. July 18, 2002) that the elective share trust provisions of C.R.S. § 15-11-201(2) will not shelter assets awarded to an incapacitated spouse as part of the elective share from Medicaid eligibility considerations. Although petitions for certiorari have been filed in Faller, and two companion cases, no decision has been made as of the date this article went to print.

Colorado's elective share statutes are found at C.R.S. § 15-11-201 *et. seq.*, and provide that a surviving spouse has a right to an elective share amount from the augmented estate (as calculated by C.R.S.§ 15-11-202), even though the decedent's will does not provide for the surviving spouse. The actual percentage of the augmented estate which may be taken by the surviving spouse is based on a sliding scale which ranges from a high of 50% for marriages of 10 years or more to 5% for marriages of one year. The failure of a Medicaid recipient to exercise the election is treated by the Department as a disqualifying transfer, which renders the surviving institutionalized spouse ineligible for Medicaid for a period of time. If the surviving spouse has capacity, the elective share amount, plus applicable allowances, if any, is delivered to the surviving spouse, and if that person is on Medicaid, he or she will almost invariably lose Medicaid eligibility because the individual will have more than $2,000.00 in countable assets. However, if the surviving spouse is incapacitated, as is often the case when the surviving spouse is in a nursing home on Medicaid, the elective share trust provisions of C.R.S. § 15-11-206(2) would appear to come into play. This statute provides that if an election is exercised on behalf of a surviving spouse who is an incapacitated person, the elective share amounts are to be placed into an irrevocable trust under which the trustee has full discretion to make distributions, but with regard to "other support, income, and property of the surviving spouse **and** benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need." C.R.S. § 15-11-206(2)(a) [Emphasis Added].

When this Section of the UPC II was before the Uniform Law Commissioners, it is reported that a question was raised in the Drafting Committee as to whether the elective share trust should be designed so as to protect the surviving spouse from Medicaid disqualification. It was decided that the Medicaid disqualification language should be drafted in the alternative so that each state which adopted UPC II could make a determination as to the policy to be favored. Thus, states were given the choice of inserting the term "exclusive of" in place of the word "and." As reflected in C.R.S. § 15-11-206(2), the Colorado legislature adopted the term "and," rather than "exclusive of."

In three lower court cases, each involving a community spouse who had predeceased her institutionalized spouse, the Courts authorized placement of the applicable elective share into trusts to be administered in such a way as to preserve the institutionalized spouse's Medicaid eligibility. The decisions were appealed by the Department, and in July 2002, the Court of Appeals issued decisions reversing and remanding all three cases to the lower courts. In the published Faller opinion, the Court agreed with the Department's argument that the Colorado legislature has approved only three types of trusts that may be created for establishing or maintaining Medicaid eligibility - income trusts under C.R.S. §15-14-412.7, disability trusts under C.R.S. §15-14-412.8, and pooled trusts under C.R.S. §15-14-412.9. The Court relied specifically on C.R.S. §15-14-412.6(2) which prohibits a court from authorizing a trust "that has the effect of qualifying or purports to qualify the trust beneficiary for public assistance."

In September 2002, Petitions for Certiorari were filed with the Colorado Supreme Court seeking a review of all three of the Court of Appeals decisions. Petitioners have argued that the Court of Appeals' interpretation of the relevant statutes does not comply or comport with: the legislative history associated with C.R.S. 15-11-206(2) as evidenced by the UPC Comments and the Colorado legislature's choice to insert "and" vs. "exclusive of" in the statute; state and federal Medicaid law; established rules of statutory construction (later enact-

ment controls); and the Colorado Supreme Court's decisions concerning what may be considered "property."

The Statutory Revisions Committee of the Trust and Estate Section is also considering a legislative solution to this issue.

U.S. District Court Approves Department's Inclusion of Community Spouse's IRAs and Pension Benefits as Countable Assets, Even on a Retro-Active Basis.

In *Charles Houghton, et. al. v. Karen Reinerstson,* Civil Action NO. 01-MW-2291 (OES), the U.S. District Court for the District of Colorado upheld, by summary judgement, the Department's ability to include IRAs and other pension benefits of a community spouse as countable assets subject to spend-down for Medicaid eligibility.

Prior to September 2001, IRAs and pension funds owned by the community spouse were specifically excluded, by regulation, from consideration as assets which could be deemed available to the institutionalized spouse. The Department reversed this position by deleting the prior rule and enacting 10 C.C.R. 2505-10, Section 8.110.51(C), which provides, in pertinent part, that IRAs, Keogh Plans, 401(k)s, 403(b)s and other retirement accounts "in the name of a community spouse who is married to an applicant who is applying for long term care in a nursing facility, HCBS or PACE, are countable as a resource to the applicant and may be included in the Community Spouse Resource Allowance (CSRA) up to the maximum amount allowable." Rather than apply the rule on a prospective basis, the Department instructed eligibility technicians to also apply the new rule when conducting annual redetermination reviews. The consequence of this ruling is that many individuals already eligible for Medicaid for several years will lose their Medicaid eligibility until the community spouse spends down the community spouse's previously exempt retirement account. The Plaintiffs are currently considering an appeal.

2003 Financial Eligibility Adjustments for Medicaid

Supplemental Security Income Cap (Individual)	$552.00
Colorado Income Cap (300% of SSI)	$1,656.00
Spousal Impoverishment	
Maximum Resource Allowance	$90,660.00
Maximum Monthly Maintenance Needs Allowance (note that minimum of $1,493.00 adjusted July 1)	$2,266.50
Excess Shelter (adjusted July 1 of each year)	$448.00
Medicare Part B Premium	$58.70
State Average Nursing Home Private Pay Rate (divisor in computing penalty periods)	$4,424.00
Regional Private Pay Rates (Miller Trust eligibility)	
Region I (Adams, Arapahoe, Boulder, Denver and Jefferson)	$4,747.00
Region II (Cheyenne, Clear Creek, Douglas, Elbert, Gilpin, Grand, Jackson, Kit Carson, Larimer, Logan, Morgan, Park, Phillips, Sedgwick, Summit, Washington, Weld,Yuma)	$4,419.00
Region III (Alamosa, Baca, Brent, Chaffee, Conejos, Costilla, Crowley, Custer, El Paso, Fremont, Huerfano, Kiowa, Lake, Las Animas, Lincoln, Mineral, Otero, Prowers, Pueblo, Rio Grande, Saguache, Teller)	$4,127.00
Region IV (Archuleta, Delta, Delores, Eagle, Garfield, Gunnison, Hinsdale, La Plata, Mesa, Moffat, Montezuma, Montrose, Ouray, Pitkin, Rio Blanco, Routt, San Juan, San Miguel)	$4,404.00

Authors Wanted

The Colorado Estate Planning Handbook is being completely revised and will be reprinted by CLE in Colorado, Inc. in a new format. Many of the current authors have agreed to revise their chapters. There are some current topics which need to have a new author. Those topics are Personal Property, Protected Persons, Joint Tenancy, Community Property, Contracts to Will, Estate Liquidity and Ethics. There are also several new topics that need an author or authors. These new topics are Farm and Ranch, Irrevocable Trusts, Directives, QPRTs, GRATs and Installment Sales to GRATs. Jim Buchanan has offered to work with or help edit the new chapter on Irrevocable Trusts in addition to his chapter on Revocable Trusts. Take a look at the Handbook, and if you would like to sign up for any of these topics or want to volunteer to work on a topic with someone else, call or email Dawn McKnight at CLE (303) 824-5337 or dmcknight@cobar.org.Thank you. David Johns, Julia McVey, Constance Wood, Co-Editors.

SAVE THE DATE
Don't miss CBA-CLE's annual

ESTATE PLANNING RETREAT
June 19-21, 2002
Great Divide Hotel
Breckenridge, CO

Don't miss this opportunity to network with your colleagues and learn the latest in Estate Planning!

For more information, please call CBA-CLE at 303-860-0608 (toll free 888-860-2531) or visit our website at www.cobar.org/cle

TRUST & ESTATE SECTION

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The Trust & Estate Council and sub-committees normally meet on the third Thursday of the month at the offices of the CBA. All Trust & Estate Section members are invited and encouraged to attend any of the meetings. Contact sub-committee chairs for further information.

For committee chairs and activities visit the CBA website at: www.cobar.org and click on the Trust & Estate Section

ASSET PROTECTION

January 30, 2003 CBA-CLE Classroom, 1900 Grant Street, 3rd Floor, Denver

Don't miss our incredible local and national faculty as they cover everything you need to know about Asset Protection, including:

- **Basic Asset Protection Methods under Colorado law**
- **Domestic Protection Planning**
- **Life Insurance in Connection with Asset Protection**
- **Methodology for Foreign Asset Protection, and Preferred Jurisdictions**
- **Asset Protection in Real Estate, Including CUFTA**
- **Ethics**

Submitted for 7 general credits, including 1.2 ethics

Tuition:	CBA Trust & Estate Section Member	$159
	CBA Member	$169
	Non-Member	$189

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BASIC ESTATE ADMINISTRATION

February 28, 2003, CBA-CLE Classroom, Denver

This form-intensive seminar includes essential topics such as:

- ◆ Overview of the Probate Process
- ◆ Initial Client Interview
- ◆ Rights of Surviving Spouse and Family
- ◆ Creditors' Claims
- ◆ Real Estate Transfers
- ◆ Closing the Estate

And much more!

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SUPER THURSDAY ACTIVITY SCHEDULE

ORANGE BOOK COMMITTEE
9:00 a.m. - 10:30 a.m.
Small Classroom, 3rd Fl

ELDER LAW FORUM COMMITTEE
9:00 a.m. - 11:00 a.m.
Executive Conference Rm, 9th Fl

UNITRUST AMENDMENT TO UPIA
10:30 a.m. - 12:00 noon
Location TBA

COMMUNITY AND CIVIC AFFAIRS
11:00 a.m. - 12:30 a.m.
Executive Conference Rm, 9th Fl

UNIFORM DISCLAIMER OF PROPERTY INTEREST
11:00 a.m. - 1:00 p.m. a.m
Capitol Conference Rm, 9th Fl

RULES AND FORMS
12:00 a.m. - 1:30 p.m.
Executive Conference Rm, 9th Fl

CLE
12:30 a.m. - 1:30 p.m.
Terrace Conference Rm, 9th Fl

STATUTORY REVISIONS
1:30 p.m. - 3:15 p.m.
Executive Conference Rm, 9th Fl

TRUST AND ESTATE SECTION COUNCIL
3:15 p.m. - 5:00 p.m.
Executive Conference Rm, 9th Fl

For up-to-date schedules, visit the CBA website at www.cobar.org and click on the Trust & Estate Section.

The Colorado Bar Association
1900 Grant Street, Suite 950
Denver, Colorado 80203

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