Wills and Trusts
Laws 6104
University of Colorado Law School
Spring Semester 2010
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Course Materials.


Course Objectives.

· Substantive foundation in the law.
· Application of the law with some emphasis on Colorado law through study of the Uniform Probate Code.

Office Hours.

2:30-3:30 PM, Tuesdays and Thursdays. I am also available to meet at other times by appointment. I welcome communication by email. Please register early on the TWEN website for this course so that you can receive email notices and have access to course materials posted on the TWEN site.

Class Attendance.

Class attendance is very important and, as discussed below, will be reflected in your final grade. We have a lot to cover in this course. I expect you to diligently prepare, keep up, think about the materials, and ask me questions as they arise.

Starting Thursday, January 14, I will begin taking attendance using my copy of the seating chart. You are required to attend at least 80 percent of our classes, which means 21 or more of our 28 regularly scheduled classes (I will not count the first day). If you do not, I will lower your final course grade three points (e.g., from an 86 to an 83). However, in addition to the three-point reduction described in the preceding sentence, I reserve the right also to impose in cases of very excessive absenteeism: (i) a five point total reduction in your final course grade; or (ii) the “20%
Rule” prescribed by Law School Rule § 3-3-1, with the result that you would be unable to take the final examination for the course. Please note that the 80 percent calculation begins with the second class, even if you add this course to your schedule after that date. I may also raise grades for sustained and exceptional class participation throughout the semester.

The attendance requirement applies regardless of your other commitments such as to dependents, to jobs, etc., except for illness, job interviews, legal aid clinic appointments, or religious observance (with respect to excused absences please email me in advance of your absence). This means you must plan ahead and save your permitted absences for when you need them.

The responsibility for good recordkeeping is on you, but I will email you if I find you are close to violating the 80 percent rule or the “very excessive absenteeism” rule.

Final Examination.

The final examination will be about three hours long (no longer than 3 ½ hours, but no shorter than 3 hours). The examination will cover the entire course. Expect a mixed essay and multiple-choice questions final (or possibly all mixed essay or all multiple choice) to which you should bring your casebook, statutory supplement (annotated as you wish) and syllabus. You may also bring your class notes and personal outlines, plus any emails or postings from me. Only students who appear on the seating chart are eligible to take the final exam.

Class Policies.

Disability accommodations. The University of Colorado has a written policy on accommodating people with disabilities. Disability Services determines accommodations based on documented disabilities. Contact: 303-492-8671, Willard 322, and www.Colorado.EDU/disabilityservices. For additional assistance, you may also contact the Law School’s Assistant Dean Lorenzo Trujillo (303-492-6682, lorenzo.trujillo@colorado.edu).

Religious accommodation. The University of Colorado has a written policy on accommodations for religious observances and obligations. The policy requires that faculty make every effort to reasonably and fairly deal with all students who, because of religious obligations, have conflicts with scheduled exams, assignments or required attendance. In this class, if you need an accommodation, please notify me at least one week in advance so we can work together on an appropriate accommodation. For the details of the University’s policy, please see http://www.colorado.edu/policies/fac_relig.html

Classroom behavior. The University of Colorado has a written policy on classroom behavior. Students and faculty each have responsibility for maintaining an appropriate learning environment. Students who fail to adhere to such behavioral standards may be subject to discipline. Faculty have the professional responsibility to treat all students with understanding, dignity and respect, to guide classroom discussion and to set reasonable limits on the manner in which
they and their students express opinions. Professional courtesy and sensitivity are especially important with respect to individuals and topics dealing with differences of race, culture, religion, politics, sexual orientation, gender variance, and nationalities. See polices at
http://www.colorado.edu/policies/classbehavior.html and at
http://www.colorado.edu/studentaffairs/judicialaffairs/code.html#student_code

**Sexual harassment.** The University of Colorado at Boulder policy on Discrimination and Harassment (http://www.colorado.edu/policies/discrimination.html, the University of Colorado policy on Sexual Harassment, and the University of Colorado policy on Amorous Relationships apply to all students, staff and faculty. Any student, staff or faculty member who believes s/he has been the subject of discrimination or harassment based upon race, color, national origin, sex, age, disability, religion, sexual orientation, or veteran status should contact the Office of Discrimination and Harassment (ODH) at 303-492-2127 or the Office of Judicial Affairs at 303-492-5550. Information about the ODH and the campus resources available to assist individuals regarding discrimination or harassment can be obtained at http://www.colorado.edu/odh

The sexual harassment policy requires all supervisors, which includes all faculty members, who experience, witness or receive a written or oral report or complaint of sexual harassment or related retaliation to promptly report it to the campus sexual harassment officer. This means that as a faculty member, I must report all allegations of sexual harassment that come to my attention; however, there are several offices on campus that can provide free, confidential guidance to faculty, staff and students who believe they have been sexually harassed. A complete list of these offices can be found at: http://www.colorado.edu/sexualharassment/resources.html

**Assignments (all page numbers refer to the casebook unless otherwise noted).**

1. **January 12, 2010.** xxxi-xxxii, 27-49, 58-70. Skim UPC § 1-201. Consider problems 1-4 on pp. 47-48, particularly with reference to the UPC. Do you accept Senator Lieberman’s justification of his actions in note 2 on p. 33? Do your potential concerns matter if the family, i.e., the living, reconciled? See UPC § 3-912. Read UPC 2-517 & 3-905 (similar to CRS §§ 15-11-517 & 15-12-905). What is the relationship of those sections to Shapira? Note that Estate of Feinberg (note 3, p. 34) was reversed by the Illinois Supreme Court.

With respect to probate, read UPC § 2-516 (similar to CRS § 15-11-516 except that the Colorado statute imposes a 10 day deadline following the decedent’s death), UPC § 3-801 (similar to CRS 15-12-801), UPC §§ 3-1201 & 1202 (similar to CRS §§ 15-12-1201 & 1202, except that the Colorado limit is $50,000 and only 10 days need have elapsed since the decedent’s death, plus the statute expressly refers to stock brands and “registered title of an personal property of the decedent”). Please go to the following link and
read the small estate personal property affidavit form:
http://www.courts.state.co.us/Forms/Forms_List.cfm/Form_Type_ID/183

The ACTEC engagement letter language in n. 1 on p. 69 is very common. Do you think that it causes spouses to confess their secrets?

This course is primarily about donative property transfers at death. These depend on state statutes that differ in every state. The 1969 Uniform Probate Code (UPC, see page 43) was an attempt to achieve greater uniformity, and Colorado (in 1973) is among the states that adopted it. See CRS tit. 15, arts. 10-17. Colorado is one of a smaller number of states that adopted most of the somewhat controversial 1990 amendments to the UPC. Our casebook reflects 2008 amendments to the UPC, and the Colorado legislature adopted a number of those amendments, effective as of July 1, 2010. Every adopting state made enough changes in the UPC to defy uniformity. On the other hand, the general scheme of wills and trusts derived from English law (and from which the UPC is derived) is similar in all common-law states and is the basis for the casebook. Although we will emphasize the UPC, you will still have a general sense of how the law of wills and trusts is applied in non-UPC jurisdictions.

Omitted pages 1-26, for the most part, discuss policy and constitutional questions about whether to allow inheritance. We omit them due to time constraints and because inheritance is settled policy in every state and certain to remain so. The only issue much contested is estate and inheritance taxes, and those are beyond our scope. We are not reading the Shaw Family Archives case at pp. 10-15 which deals with the narrow issue of whether a will can transmit property acquired by the estate after the decedent’s death. In that regard, UPC § 2-602 & CRS 15-11-602, unlike the law that applied to that case, expressly provide that “A will may provide for the passage of all property the testator owns at death and all property acquired by the estate after the testator’s death.” Read the official comment to UPC § 2-602. As suggested by the casebook readings, the various “nonprobate” or “will substitute” assets that are exempt from probate administration detract from the apparent broad sweep of that provision. On the other hand, nonprobate assets only pass if one has utilized a beneficiary designation, transferred the asset into a revocable trust, created a joint tenancy, and so forth. An unappreciated strength of the probate system is that it remains a fallback for nonprobate assets that fall through the cracks.

The Colorado statute below can permit spouses to further avoid the necessity of probate.

CRS § 15-11-805. Ownership of personal property between spouses

(1) For purposes of this article, tangible personal property in the joint possession or control of the decedent and his or her surviving spouse at the time of the decedent's death is presumed to be owned by the decedent and the decedent's spouse in joint tenancy with right of survivorship if ownership is not otherwise evidenced by a certificate of title, bill of sale, or other writing. This presumption shall not apply to:

(a) Property acquired by either spouse before the marriage;
(b) Property acquired by either spouse by gift or inheritance during the marriage;

(c) Property used by the decedent spouse in a trade or business in which the surviving spouse has no interest; or

(d) Property held for another.

(2) The presumption created in this section may be overcome by a preponderance of the evidence demonstrating that ownership was held other than in joint tenancy with right of survivorship.


The Colorado intestacy statute for the surviving spouse resembles the UPC statute on page 73, due to the adoption of the 2008 UPC amendments that are effective as of July 1, 2010. Prior to July 1, 2010, the Colorado statute notably included a subsection (5) which provided that when one or more of the decedent’s surviving descendants are minor children and not descendants of the surviving spouse, the spouse’s share is one-half the intestate estate with no fixed amount off the top. “(5) If one or more of the decedent's surviving descendants are not descendants of the decedent's surviving spouse, and if one or more of such descendants who are children of the decedent are minors, then the surviving spouse receives one-half of the intestate estate.” That has been removed. **Question: Under the new statute, what would be the surviving spouse’s share in the situation addressed by the old (5)?**

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**§ 15-11-102. Share of spouse [effective July 1, 2010]**

The various possible circumstances describing the decedent, his or her surviving spouse, and their surviving descendants, if any, are set forth in this section to be utilized in determining the intestate share of the decedent's surviving spouse. If more than one circumstance is applicable, the circumstance that produces the largest share for the surviving spouse shall be applied. The intestate share of a decedent's surviving spouse is:

(1) The entire intestate estate if:

(a) No descendant or parent of the decedent survives the decedent; or

(b) All of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(2) The first three hundred thousand dollars, plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;
(3) The first two hundred twenty-five thousand dollars, plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) The first one hundred fifty thousand dollars, plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.


(6) The dollar amounts stated in this section shall be increased or decreased based on the cost of living adjustment as calculated and specified in section 15-10-112.

UPC §§ 2-104 and 2-702, p. 86, require clear and convincing proof of survival by at least 120 hours (5 days) in cases of deaths occurring close together. The first section applies to intestacy and other statutory situations. The second applies to wills, joint tenancies, life insurance, and other will substitutes. Both sections provide that each decedent is deemed to have predeceased the other except for joint tenancy, where each is deemed to survive the other. The UPC § 1-201(18) definition of “governing instrument” is crucial to understanding the application of this section.

A Nitpick Sidebar About Colorado Simultaneous Death

Colorado modified UPC § 2-702 by retaining (it had resided elsewhere in the probate code) a section 712 not found in the UPC, CRS § 15-11-712. Section 712 represents the remnants of the Uniform Simultaneous Death Act which dates back to 1940 in its earliest iteration. Indeed, Sauters v. Stolz, 218 P.2d 741 (1950) dealt with the near simultaneous death of two spouses in a car accident. In the same manner as Janus v. Tarasewicz, it was established that one of the spouses still had a heartbeat while the other did not, so the requirement that “there is no clear and convincing evidence that two joint tenants have died otherwise than simultaneously” was not met and the “survivor” took all. UPC §§ 2-104 & 2-702 have addressed most of the simultaneous death concerns, so the Uniform Simultaneous Death Act in its current version “is appropriate for enactment in states that have not enacted Sections 1-107, 2-104, and 2-702 of the Uniform Probate Code.” (taken from the Prefatory Note to the USDA on p. 651 of our supplement). The Prefatory Note to the USDA is a good background resource for wrestling with the implications of the UPC provisions in comparison with the old USDA. CRS § 15-11-712 controls “in those situations not subject to the control of section 15-11-702.” In customary 1953 USDA style, it begins by providing that lacking sufficient proof of other than simultaneous death, each party is deemed to have survived the other rather than predeceased the other as the UPC provides. But the section has a specific provision for life insurance that states that an insurance beneficiary who must survive does not take without proof of survival—the same result as the UPC. And,
there is a specific provision for joint tenancies. The Colorado provision seems to make a difference only when two or more persons who must survive to take die simultaneously. In that case, under the Colorado law, each takes a share. Under the UPC, neither takes. A rare situation. Again, because section 712 is a precautionary default provision, most situations will be addressed by UPC 2-702.

Colorado is among the relatively few states that adopted the system for determining shares of descendants known as per capita at each generation, described at pp. 89-90. However, Colorado did this by replacing the phrase “by representation” with “per capita in each generation” directly in Colorado’s version of UPC § 2-103, rather than relying on the definition in § 2-106, as the UPC does. Read UPC §§ 2-103 & 2-106.

The Colorado version of UPC § 2-103 was amended in two steps by the 2009 General Assembly. The first changes most notably addressed the inheritance rights of a “designated beneficiary” (which could include unmarried partners) and were effective as of July 1, 2009. See CRS § 15-11-103(1) below. The Colorado Designated Beneficiary Agreement Act is found at CRS §§ 15-22-101 through 15-22-112 and the details are beyond our scope. However, the Act addresses a number of areas beyond intestate succession, including rights to appointment as a conservator or personal representative, as a proxy decision-maker, and standing for wrongful death claims. Read pp. 191-193 as a preview of why Designated Beneficiary Agreements may still play a role in estate transmission even if a will has been executed. The second changes embrace the 2008 amendments to the UPC, and that applies as of July 1, 2010.

**CRS § 15-11-103. Share of heirs other than surviving spouse [effective July 1, 2010]**

Any part of the intestate estate not passing to the decedent's surviving spouse under section 15-11-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals who survive the decedent:

(1) To a designated beneficiary who was designated by the decedent to be his or her designated beneficiary for purposes of intestate succession pursuant to a designated beneficiary agreement that has been executed and recorded with a county clerk and recorder as provided in article 22 of this title; except that, if the decedent has surviving children, then the designated beneficiary shall receive one-half of the intestate estate and the surviving children shall receive one-half of the intestate estate;

(2) To the decedent's descendants per capita at each generation;

(3) If there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent if only one survives;

(4) If there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them per capita at each generation;
(5) If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived on both the paternal and maternal sides by one or more grandparents or descendants of grandparents:

(a) Half to the decedent's paternal grandparents equally if both survive, to the surviving paternal grandparent if only one survives, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking per capita at each generation; and

(b) Half to the decedent's maternal grandparents equally if both survive, to the surviving maternal grandparent if only one survives, or to the descendants of the decedent's maternal grandparents or either of them if both are deceased, the descendants taking per capita at each generation;

(6) If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents on the paternal but not the maternal side, or on the maternal but not the paternal side, to the decedent's relatives on the side with one or more surviving members in the manner as described in subsection (4) of this section;

(7) If there is no taker under subsections (1) to (6) of this section, but the decedent has:

(a) One deceased spouse who has one or more descendants who survive the decedent, the estate or part thereof passes to that spouse's descendants per capita at each generation; or

(b) More than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate or part thereof passes to each set of descendants per capita at each generation.


Note 4 on p. 91 foreshadows the importance of intestate succession language in the larger context of wills and trusts. The pivotal section is UPC § 2-709; please read it. The Colorado legislature tinkered with the language so there are more possibilities, so one must be careful in using the terminology.

CRS § 15-11-709. By representation; per capita at each generation; per stirpes

1) Definitions. As used in this section, unless the context otherwise requires:

(a) “Deceased child” or “deceased descendant” means a child or a descendant who either predeceased the distribution date or is deemed to have predeceased the distribution date under section 15-11-702.

(b) “Distribution date”, with respect to an interest, means the time when the interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but may occur at a time during the course of a day.
(c) “Surviving ancestor”, “surviving child”, or “surviving descendant” means an ancestor, a child, or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under section 15-11-702.

(2) **Per capita at each generation.** If an applicable statute or a governing instrument calls for property to be distributed “per capita at each generation”, the property is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the distribution date.

(3) **Per stirpes.** If a governing instrument calls for property to be distributed “per stirpes”, the property is divided into as many equal shares as there are (i) surviving children of the designated ancestor and (ii) deceased children who left surviving descendants. Each surviving child, if any, is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.

(4) **Deceased descendant with no surviving descendant disregarded.** For the purposes of subsections (2), (3), and (5) of this section, an individual who is deceased and left no surviving descendant is disregarded, and an individual who leaves a surviving ancestor who is a descendant of the designated ancestor is not entitled to a share.

(5) **By representation.** For all governing instruments executed before, on, or after July 1, 1995, unless the governing instrument provides otherwise, the following definition of “by representation” shall apply: If “by representation” is called for, the property is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share and the share of each deceased descendant in the same generation is divided among his or her descendants in the same manner.

3. **January 19, 2010.** 97-109, note 1 on p. 113, UPC § 2-122, pp. 115-132

Colorado has largely adopted the 2008 UPC amendments in this area, effective July 1, 2010. This is a complex mess at first blush, and Colorado lawyers, as first users of the 2008 UPC amendments, will need to learn these rules. These issues won’t go away, and even if one is drafting wills or trusts, the issues raised by the 2008 amendments are important to consider in those contexts when defining “descendants.” The reading in the casebook refers to the UPC amendments in connection with its discussion of the various contexts, and that is a convenient way to ease into the statutes. I am not particularly interested in addressing all of the nuances of these sections, but we need to understand their gist. To gain some overall sense of the doctrinal tangle, please read the following UPC sections: 1-201(5), 1-201(9), 1-201(20), 1-201(24), 1-201(32), 2-104, 2-114, 2-115, 2-116, 2-117, 2-118, 2-119 (would impact *Hall*), 2-120 (would impact *Woodward*), 2-121, 2-701 (and the overall preface to this Part—the point is that intestate succession concepts and definitions play a role in wills and trusts), 2-705 (this would impact *Minary* and *In re Martin B*), 2-708, and 2-711 (would impact *Minary*).
Colorado has a specific section on adult adoption that allows a person “to adopt an adult as heir” and does not prevent adopting one’s spouse. CRS § 14-1-101. The impact of whether the adoptee can take as a descendant under instruments executed by individuals other than the adoptive parent(s) is primarily addressed by UPC § 2-705.


Regarding advancements, pages 133-136, Colorado adds the following to UPC § 2-109:

| CRS § 15-11-109(4) | An heir who has received from the intestate estate more than his or her share shall in no case be required to refund, except as otherwise provided by section 15-11-203 [defining the spouse’s elective share]. |

However, as the book states, neither the UPC nor the common law requires advancements to be repaid, unless the recipient participates in the “hotchpot” described in the official comment to UPC § 2-109. Under UPC § 2-302(b)(2) a more relaxed rule for proving advancements (to counter a claim of an omitted child) applies to children omitted from a will, examined at pages 531-533.

Regarding UPC § 5-104 cited on page 138, Colorado parts with the $5,000 fixed amount approach of the UPC, and allows transfer of the annual federal gift tax exclusion, now $13,000 per year. CRS § 15-14-104(1).

Read UPC § 2-803 in connection with *In re Estate of Mahoney*; read the title of the Part 8 of the UPC.

**UDPIA, UPC §§ 2-1101 through 2-1107** is controversial. Colorado has not adopted UDPIA, and relies on the former, single section approach of old UPC 2-801 (In the UPC, the space for old 2-801 is now vacant and “reserved”.) By following the old UPC, the Colorado statute includes the nine-month time limit described on page 153, not the unlimited time of the current UPC. CRS § 15-11-801(2). Under either the UPC or Colorado law, a disclaimer is barred by a transfer of the interest, acceptance of benefits of the interest, or a sale of the property under judicial sale. Compare UDPIA § 2-1113 and UPC § 2-801 (e) (on p. 199 of the Code book). Acceptance of the interest is a common manner in which possible disclaimers are nullified.

The problem on p. 154 deals with an intestate estate. What result if someone disclaims an interest under a will, or under a trust, or under a joint tenancy? Consider UPC § 2-1106 in this regard, as well as old 2-801(d) which is reproduced on p. 190 of the Code book.

Although disclaimers have other possible uses (notably, creditor avoidance), the principal role is federal wealth transfer tax avoidance. The applicable Internal Revenue Code section is set out below.
26 U.S.C. § 2518. Disclaimers

(a) General rule.--For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle [i.e., Subtitle B of the Internal Revenue Code, applying to estate and gift taxes] shall apply with respect to such interest as if the interest had never been transferred to such person.

(b) Qualified disclaimer defined.--For purposes of subsection (a), the term “qualified disclaimer” means an irrevocable and unqualified refusal by a person to accept an interest in property but only if--

(1) such refusal is in writing,

(2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of--

(A) the day on which the transfer creating the interest in such person is made, or

(B) the day on which such person attains age 21,

(3) such person has not accepted the interest or any of its benefits, and

(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either--

(A) to the spouse of the decedent, or

(B) to a person other than the person making the disclaimer.

(c) Other rules. . . .

5. January 26, 2010. 159-180. Read UPC §§ 2-501, 3-407, & 1-306. Now that we are dealing with wills, please take a few minutes to read a simple will form that I have posted on TWEN. Please read Form 6-Nontrust Will, taken from the Colorado Orange Book. You might wish to print a copy of this instrument as I will refer to it from time to time.

6. January 28, 2010. 180-210. Read UPC § 2-517 again. While the advice in note 2, p. 198 is standard fare (“avoid too much detail”) there is increasing interest in so-called “ethical wills” in which the testator speaks more fully about his or her feelings about the family, gives advice, imparts values, etc.

The Colorado UPC provision on will execution, effective as of July 1, 2010 resembles that at pages 227-228. Prior to July 1, 2010, the Colorado statute does not recognize the new 2008 UPC change in § 2-502(3)(B) introducing notarized wills. In any event, the pre- and post-July 1, 2010 Colorado statute states a modified rule for witnesses:

CRS § 15-11-502(1)(c). . . Signed by at least two individuals, either prior to or after the testator's death, each of whom signed within a reasonable time after he or she witnessed either the testator's signing of the will as described in paragraph (b) of this subsection (1) or the testator's acknowledgment of that signature or acknowledgment of the will. .

(4) For purposes of this section, "conscious presence" requires physical proximity to the testator but not necessarily within testator's line of sight.

Colorado’s addition of “either prior to or after the testator's death” was a reaction to the decision cited at the top of page 238, In re Estate of Royal.

Both UPC § 2-502 and the Colorado version partly quoted above appear to do away with the concept of conscious presence for witnesses discussed in the note on pp. 233-234, retaining the concept only for someone who signs on behalf of an infirm testator. However, the UPC provision on self-proving wills, cited and described at page 244 states in its attestation clause that the witnesses signed “in the presence and hearing of the testator.” Colorado has them attest that they signed “in the conscious presence of the testator.” CRS § 15-11-504.

The UPC court deposit statute cited at page 246 and its Colorado twin allow deposit of a will “with any court for safekeeping, under rules of the court.” CRS § 15-11-515. However, many of the populous counties in Colorado do not permit safekeeping of new wills due to lack of storage capacity.

Below is the Colorado statute governing access to safe deposit boxes, a typical repository of original wills.

CRS § 15-10-111. Entry into safe deposit box of decedent--definitions

(1)(a) Whenever a decedent at the time of his or her death was a sole or joint lessee of a safe deposit box, the custodian shall, prior to notice that a personal representative or special administrator has been appointed, allow access to the box by:

(I) A successor of the decedent, if such decedent was the sole lessee of the box, upon presentation of an affidavit made pursuant to section 15-12-1201 for the purpose of delivering the contents of the box in accordance with said section; or

(II) A person who is reasonably believed to be an heir at law or devisee of the decedent, a person nominated as a personal representative pursuant to the provisions of section 15-12-203(1)(a), or
the agent or attorney of such person for the purpose of determining whether the box contains an instrument that appears to be a will of the decedent, deed to a burial plot, or burial instructions.

(b) If a person described in subparagraph (I) or (II) of paragraph (a) of this subsection (1) desires access to a safe deposit box but does not possess a key to the box, the custodian shall drill the safe deposit box at the person's expense. In the case of a person described in subparagraph (I) of paragraph (a) of this subsection (1), the custodian shall deliver the contents of the box, other than a purported will, deed to a burial plot, and burial instructions, to the person in accordance with section 15-12-1201. In the case of a person described in subparagraph (II) of paragraph (a) of this subsection (1), the custodian shall retain, in a secure location at the person's expense, the contents of the box other than a purported will, deed to a burial plot, and burial instructions. A custodian shall deliver a purported will as described in paragraph (c) of subsection (2) of this section. A deed to a burial plot and burial instructions that are not part of a purported will may be removed by a person described in subparagraph (I) of paragraph (a) of subsection (1) of this section pursuant to paragraph (d) of subsection (2) of this section, and the custodian shall not prevent the removal. Expenses incurred by a custodian pursuant to this section shall be considered an estate administration expense.

(c) A representative of the custodian shall be present during the entry of a safe deposit box pursuant to this section.

(2)(a) If an instrument purporting to be a will is found in a safe deposit box as the result of an entry pursuant to subsection (1) of this section, the purported will shall be removed by the representative of the custodian.

(b) At the request of the person or persons authorized to have access to the safe deposit box under the provisions of subsection (1) of this section, the representative of the custodian shall copy each purported will of the decedent, at the expense of the requesting person, and shall deliver the copy of each purported will to the person, or if directed by the person, to the person's agent or attorney. **In copying any purported will, the representative of the custodian shall not remove any staples or other fastening devices or disassemble the purported will in any way.** [Why is this required?]

(c) The custodian shall mail the purported will by registered or certified mail or deliver the purported will in person to the clerk of the district or probate court of the county in which the decedent was a resident. If the custodian is unable to determine the county of residence of the decedent, the custodian shall mail the purported will by registered or certified mail or deliver the purported will in person to the office of the clerk of the proper court of the county in which the safe deposit box is located.

(d) If the safe deposit box contains a deed to a burial plot or burial instructions that are not a part of a purported will, the person or persons authorized to have access to the safe deposit box under the provisions of subsection (1) of this section may remove these instruments.
(3) After the appointment of a personal representative or special administrator for the decedent, the personal representative or special administrator shall be permitted to enter the safe deposit box upon the same terms and conditions as the decedent was permitted to enter during his or her lifetime.

(4) If at the time of the decedent's death one or more other persons were legally permitted to enter the safe deposit box, their permission to enter shall continue, notwithstanding the death of the decedent.

8. February 4, 2010. 246-264

The Colorado UPC provision on harmless error is like that at page 258 with the following additions:

CRS § 15-11-503(2) Subsection (1) of this section shall apply only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse.

(3) Whether a document or writing is treated under this section as if it had been executed in compliance with section 15-11-502 is a question of law to be decided by the court, in formal proceedings, and is not a question of fact for a jury to decide.

Colorado modified the UPC to deny probate to documents intended as wills but neither signed nor acknowledged to be. An exception for spousal mistake was inspired by cases such as Pavlinko and Snide.


Although a notarized will is valid, there still are advantages to witnessed and self-proved wills. Compare UPC §§ 3-303(c) & 3-406. What are the other potential benefits of witnessed wills? With regard to In re Estate of Kuralt appreciate that the decedent was domiciled in New York and that state does not recognize holographic wills. Why does Montana law apply?

10. February 11, 2010. 286-325. Consider the problems on pp. 287, 294-295 (don’t be confused by the Colorado decision in (b); the statute was changed after the case was decided), 298 (Q. 2 & 3), 305 (Q. 1 & 2) & 306. Read UPC §§ 2-507, 2-508, 2-509, & 2-804. Read UPC §§ 2-510, 2-512, & 2-513. Must the will “call out” a separate writing for 2-513 to apply?
Colorado’s version of UPC § 2-804, page 306, is almost the same. CRS § 15-11-804. Both sections are much longer than what is quoted in the casebook; the additional parts are protections for third parties, which are not relevant to our study. Does 2-804 apply to an irrevocable trust share created for a spouse?

Please read Form 12-Memorandum, posted on the TWEN site for an example of a UPC personal property memorandum.

11. **February 16, 2010.** 325-334, and UPC § 2-514. Consider question 1 on p. 326. A hint to the answer is presented in the official comments to UPC § 2-514.


12. **February 18, 2010.** 358-392, and UPC §§ 2-603, 2-604, 2-605, 2-606, 2-607, & 2-609. UPC § 2-603 is a difficult provision, and Colorado is one of a small minority of adopting states. We need to appreciate only the gist of the statute. Appreciate how the authors don’t reproduce it in the book, being content to reproduce on p. 365 the much simpler approach of the 1969 UPC.

Colorado adds to UPC § 2-603(b)(3) the italicized language below, giving a drafter some direction on how to avoid the grasp of 2-603:

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CRS § 15-11-603(2)(c) For purposes of this part 6, words of survivorship, such as in a devise to an individual "if he survives me" or in a devise to "my surviving children", are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. The use of language such as "and if he does not survive me the gift shall lapse" or "to A and not to A's descendants" shall be sufficient indication of an intent contrary to the application of this section.
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Does antilapse apply to gifts in an incorporated list, as in the *Greenhalge* case, page 310, or of a list of tangible property per UPC § 2-513, page 316? The UPC does not answer this. Colorado added a specific provision saying that the statute does not apply to lists under § 2-513. It still can apply to incorporated lists—they are part of the will. CRS § 15-11-603(3). UPC § 2-706 is an anti-lapse statute for a number of will substitutes that we’ll study later. Its provision on words of survivorship are parallel to those in 2-603(b)(3), and the Colorado statute again adds the latter sentence quoted above. CRS § 15-11-706(2)(c). UPC § 2-707 is an anti-lapse statute for future interests in trust, covered in chapter 13, which we shall not reach.

UPC §§ 2-603 and 2-706 protects descendants of deceased stepchildren donees from lapse, but Colorado omits them.
Regarding ademption under the UPC, pages 387-388, Colorado adopted the 1990 version of § 2-606 but not its 1997 amendment presuming in favor of ademption. Therefore, Colorado presumes against ademption. CRS § 15-11-606(1)(f).

Read the Tab B-Special Provisions document from the Orange Book posted on TWEN, as the tab refers to different ways of expressing bequests.


Colorado’s version of UPC § 6-101 on page 411 is much more extensive, but the additions do not change the basic scope of the section. CRS § 15-15-101. However, it is an interesting, very broad approach to preserving a strong firewall between probate assets and will substitutes.

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**CRS 15-15-101. Nonprobate transfers on death**

(1) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary. This subsection (1) includes a written provision that:

(a) Money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent’s death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later;

(b) Money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or

(c) Any property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(1.5) A conveyance or deed of gift described in subsection (1) of this section that relates to an interest in real property may be created pursuant to part 4 of this article and, if so created, shall be subject to the rights of third parties described in part 4 of this article.

(2) Under the provisions of subsection (1) of this section, it is permissible to designate as a beneficiary, payee, or owner a trustee named in an inter vivos or testamentary trust in existence at the date of such designation. It is not necessary to the validity of any such trust that there be in existence a trust corpus other than the right to receive the benefits or to exercise the rights resulting
from such a designation. It is also permissible to designate as a beneficiary, payee, or owner a
trustee named in, or ascertainable under, the will of the designator. The benefits or rights result-
ing from such a designation shall be payable or transferable to the trustee upon admission of the
will to probate if a testamentary trustee is the designated payee or transferee, subject to the right
of the payor to impose requirements and take actions as may a personal representative acting un-
der section 15-12-913. A trustee shall not be disqualified to receive such benefits or rights mere-
ly because the trust under which he was to act or is acting fails to come into existence or has
been distributed in part or whole, but such a trustee shall receive and distribute the proceeds in
accord with the terms of such trust.

(3) If a trustee is designated pursuant to subsection (2) of this section and no qualified trustee
makes claim to the benefits or rights resulting from such a designation within one year after the
death of the designator, or if evidence satisfactory to the person obligated to make the payment
or transfer is furnished within such one-year period that there is or will be no trustee to receive
the proceeds, payment or transfer shall be made to the personal representative of the designator,
unless otherwise provided by such designation or other controlling agreement made during the
lifetime of the designator.

(4) The payment of the benefits due or a transfer of the rights given under a designation pursuant
to subsection (2) or (3) of this section and the receipt for such payment or transfer executed by
the trustee or other authorized payee thereof shall constitute a full discharge and acquittance of
the person obligated to make the payment or transfer.

(5) Payment of the benefits due or the transfer of the rights given in accordance with a designa-
tion under the provisions of subsection (2) of this section shall not cause such benefits or rights
to be included in the property administered as part of the designator's estate under this code or to
be subject to the claims of his or her creditors, except as provided in sections 15-11-202 and 15-
15-103.

(6) Except as otherwise provided in sections 15-11-202 and 15-15-103, the express provisions of
the trust agreement, declaration of trust, or testamentary trust shall control and regulate the extent
to which the benefits or rights payable or transferable under such a designation shall be subject to
the debts of the designator if paid or transferred under the provisions of subsection (2) of this
section.

Since 2004, Colorado has authorized another will substitute called a beneficiary deed, referred to
in the book at p. 412 as a TOD Deed:

CRS § 15-15-402(1) . . . title to an interest in real property may be transferred on the
death of the owner by recording, prior to the owner's death, a beneficiary deed signed by the
owner of such interest, as grantor, designating a grantee-beneficiary of the interest. The
transfer by a beneficiary deed shall be effective only upon the death of the owner. . .
(2) The joinder, signature, consent, or agreement of, or notice to, a grantee-beneficiary of a beneficiary deed prior to the death of the grantor shall not be required. Subject to the right of the grantee-beneficiary to disclaim or refuse to accept the property, the conveyance shall be effective upon the death of the owner.

(3) During the lifetime of the owner, the grantee-beneficiary shall have no right, title, or interest in or to the property, and the owner shall retain the full power and authority with respect to the property.

§ 15-15-405(1) An owner may revoke a beneficiary deed by executing an instrument that describes the real property affected, that revokes the deed, and that is recorded prior to the death of the owner.

A revocable trust always relies on a pourover will as a backstop. Please read the Form 10-Pourover Will and Form 13B Short Form Joint Revocable Trust from the Orange Book posted on TWEN.


Colorado adopted UPC § 2-703, page 442, verbatim. CRS § 15-11-703. Colorado has many statutes regulating durable powers of attorney as well as medical directives. See CRS tit. 15 art. 14 parts 5-7; CRS tit. 15 art. 18, 18.5, & 18.6. Notably, Colorado adopted the Uniform Power of Attorney Act in 2009, CRS 15-14-701 et seq. One must comply with the statute for instruments executed on or after January 1, 2010. The Uniform Power of Attorney act is located at p. 561 of our statutory supplement. Read the Prefatory Note and skim the statute. Although more complex, the new act expressly addresses troublesome areas where agents make gifts, change beneficiary designations, etc. See § 201 of the uniform act.


Please read Form 7A-Will with Contingent Trust from the Orange Book posted on TWEN. This is a common instrument for married (or unmarried) individuals with children who are not adults.


Regarding homestead allowances, pages 474, Colorado’s general homestead exemption statute applies, including its section on surviving spouse and minor children, protecting $60,000 in value from creditors for an owner-occupied home, and $90,000 if a member of the household is disabled or elderly. CRS §§ 38-41-201, 204.

Colorado’s elective share and augmented estate provisions differ in many particulars from corresponding UPC provisions, but the basic scheme is the same. That said, while the UPC approaches the problem with multiple sections, Colorado combines many of them in a single, very
long, section, CRS § 15-11-202. Colorado adopted the 1990 UPC’s sliding scale concept for the elective share amount based on duration of the marriage (described at p. 499). But Colorado’s scale is more generous, rising from 5% after one year to 50% after ten years. CRS § 15-11-201.

For an example of a complex, estate tax-driven will, see the Form 9-Marital Deduction Will from the Orange Book posted on TWEN.

16. **March 4, 2010.** 502-521, 527-539. Read UPC § 2-302. Please read Form 24-Community Property Agreement from the Orange Book posted on TWEN.

**Trusts—Finally!**

17. **March 9, 2010.** 541-568. Consider question 1 on p. 571. Please read Form 17-Single Life Irrevocable Life Insurance Trust form from the Orange Book posted on TWEN.

18. **March 11, 2010.** 569-596. Consider question 2 on p. 575. Colorado has adopted UPC § 2-907 dealing with pet trusts. See CRS § 15-11-901. Read UPC § 2-907, in particular to determine whether a court can reduce “excessive” amounts designated for the care of an animal (e.g., a billion dollars for a poodle). Skim the short article posted on TWEN (Gazur, *Colorado Revisits the Rule Against Perpetuities*) to gain some sense of Colorado’s approach to perpetuity reform.


**Spring Break**


22. **April 1, 2010.** 688-725. Consider question 2 on p. 720—this is very pertinent. Also consider questions 1 and 2 on p. 723.

Colorado adopted the Uniform Prudent Investor Act effective in 1995. CRS tit. 15 art. 1.1.


Colorado adopted the 1997 Uniform Principal and Income Act, referenced on page 828, effective in 2001, replacing earlier versions of the same. CRS tit. 15 art. 1 pt. 4. That said, there are many transitional rules and elections to be considered.
24. **April 13, 2010.** 751-802. The material in pp. 776-802 is not particularly substantive (but interesting) so you can read it quickly.


27. **April 22, 2010.** *LAST DAY OF CLASS*-Review session.