# The Common Law Spouse in Colorado Estate Administration

**by Amy K. Rosenberg**

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**Claims of a common law spousal relationship can introduce significant uncertainty in estate administration. Knowing how the relationship arises and where to find evidence to support or contradict a claim of marriage is crucial to proper administration and prevention of fraud against a decedent's estate and its ultimate beneficiaries.**

If the first question in an estate administration matter sounds something like, "Is [the putative decedent] really dead?" it probably indicates that the case will be complicated, albeit interesting. Another leading indicator of trouble ahead could be whether the attorney's threshold questions are, "Were (or are) you married?" and "To each other?" In estate planning and estate administration, pinpointing whether a client or a decedent was married is always important and usually simple. However, Colorado lawyers can find their work complicated by the issue of a real or alleged common law marriage, the often misunderstood matrimonial state with wide-ranging legal implications for heirship, retirement benefits, estate taxes, and possibly litigation in any or all of those areas.

This article provides an overview of common law marriage in Colorado and how the existence of a common law marriage can affect estate administration. A discussion of the elements of common law marriage and other procedural issues is included.

## The State of the Law

In Colorado, various judicial and public officials and clergy may solemnize marriages, or the parties to a marriage simply may, without an officiant, solemnize their own marriage by declaring themselves to be married to each other.[1] The statutorily recognized officiant who solemnizes the marriage, or a party to the marriage, must complete a marriage certificate form and forward it for recording to the county clerk and recorder. The statutes do not specifically address the county to which the certificate must be returned, but, as a practical matter, the law seems to imply that they should be returned to the county issuing the application. This requirement is intended to provide written proof and public notice of the existence of the marriage and the date it occurred. However, Colorado also recognizes that a "common law" marriage may arise between a man and a woman who intend and agree to be married and who hold themselves out to third parties as husband and wife—without any ceremonial act by a third party or any formal, public registration of their marital status.

Common law marriage, as it currently exists in the United States, may have resulted from issues that existed when the country was much younger, such as the long distances between settlements, the scarcity of clergy and judges to solemnize marriages, and lack of ready access to repositories of public records.[2] Among the earliest references to common law marriage in Colorado is the 1897 Colorado Court of Appeals reference in *Taylor v. Taylor*.[3] The Colorado Supreme Court first recognized common law marriage in *Klipfel's Estate v. Klipfel*.[4]

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The U.S. Constitution requires that all states recognize as valid a marriage that occurs in a sister state according to the sister state's law.[5] Therefore, if a marriage validly arises at common law, it is recognized as valid everywhere in the United States. However, only a handful of states, including Colorado, permit a common law marriage to arise from its inception. (*See* accompanying sidebar entitled "Common Law Marriage by State" for a list of states that permit common law marriage, as well as the applicable statute or case law.) The difficulty this creates in estate planning and administration often turns on issues relating to what supports or contradicts the existence of a valid common law marriage and, if one exists, when the required elements came together to create it.

## What is at Stake?

When the death of a party ends a marriage and a decedent's estate is administered, it is critical first to identify the decedent's assets and determine if they constitute "probate" assets. Probate assets can pass according to the terms of a will or according to intestacy laws if the decedent died intestate (without a will). Regardless of whether the decedent had a will, probate assets are those assets the decedent owned in his or her own name alone, or that he or she co-owned with others as a tenant in common and that do not pass according to a beneficiary designation in favor of a named individual. Probate assets do not include: (1) assets the decedent held in joint tenancy; (2) "pay on death" or "transfer on death" accounts; or (3) life insurance and retirement assets payable by beneficiary designation to persons or entities other than the decedent's estate.[6]

### *The "Intestate Share"*

After the "probate" or "non-probate" status of the decedent's assets has been established, estate distribution must account for whether the decedent died intestate. If the decedent died without a will, the surviving spouse in Colorado has the following rights to the decedent's probate assets (or "intestate estate"):

1. If no descendant or parent of the decedent survives, the surviving spouse receives the entire intestate estate.
2. If all of the decedent's surviving descendants also are descendants of the surviving spouse, and there are no other descendants of the surviving spouse who survive the decedent, the surviving spouse receives the entire intestate estate.
3. If no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent, the surviving spouse receives the first $200,000, plus three-fourths of the balance of the intestate estate.
4. If all of the decedent's surviving descendants also are descendants of the surviving spouse, and the surviving spouse has one or more surviving descendants who are not the decedent's descendants, the surviving spouse receives the first $150,000, plus one-half of the balance of the intestate estate.
5. If one or more of the decedent's surviving descendants are not descendants of the decedent's surviving spouse, and all of such surviving descendants who are children of the decedent are adults, the surviving spouse receives the first $100,000, plus one-half of the balance of the intestate estate.
6. If one or more of the decedent's surviving descendants are not descendants of the surviving spouse, and if one or more of such descendants who are children of the decedent are minors, the surviving spouse receives one-half of the intestate estate.[7]

### *The "Elective Share"*

If the decedent had a valid will at his or her death, the surviving spouse need not be bound by the terms of the will, but instead may assert a right to an "elective share" of the value of the decedent's "augmented estate." The effect of the election is to prevent one spouse from disinheriting the other, absent a valid agreement or the failure of the surviving spouse to recognize and assert the election.

The "augmented estate" is the total value of the decedent's "probate" estate (reduced by funeral and administrative expenses, enforceable claims, and the family and exempt property allowances) plus some categories of the decedent's nonprobate transfers to others.[8] The surviving spouse's elective share grows with the duration of the marriage, from a small "supplemental" amount for a marriage of less than one year, to 5 percent for marriages of one but less than two years, and in increasing percentages up to half for marriages of ten years or more.[9] Thus, the earlier the marriage arose, the greater the

**Common Law Marriage by State**

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|---|---|
| **Alabama:** | *Piel v. Brown*, 361 So.2d 90, 93 (Ala. 1978). |
| **Colorado:** | *Deter v. Deter*, 484 P.2d 805, 806 (Colo.App. 1971). |
| **District of Columbia:** | *Johnson v. Young*, 372 A.2d 992, 994 (D.C. 1977). |
| **Georgia:** | GA Code Ann. §§ 19-3-1 and -1.1, invalidating common law marriage on or after January 1, 1997. |
| **Idaho:** | Idaho Code § 32-301, invalidating common law marriage effective January 1, 1996. |
| **Iowa:** | Iowa Code § 595.11. |
| **Kansas:** | Kansas Statutes § 23-104a(c). |
| **Montana:** | Mont. Code Ann. § 40-1-311. |
| **New Hampshire:** | (limited effectiveness only at death) N.H. Rev. Stat. Ann. § 457:39 (to establish marriage for purposes of identifying deceased spouse). |
| **Ohio:** | Only those common law marriages entered into before October 10, 1991 remain valid. Ohio Code Ann. § 3105.12. |
| **Oklahoma:** | Okla. Stat. Ann. title 43 § 1; *Standefer v. Standefer*, 26 P.3d 104 (Okla. 2001). |
| **Pennsylvania:** | Pennsylvania has abolished recognition of common law marriages that would have arisen after January 1, 2005. |
| **Rhode Island:** | *eMelo v. Zompa* No. 01-174-A (R.I. 2001). |
| **South Carolina:** | *Ex Parte Blizzard*, 193 S.E. 633, 634 (S.C. 1937); *Kirby v. Kirby*, 241 S.E.2d 415, 416 (S.C. 1978). The days of common law marriage may be numbered in South Carolina. Senate Bill 1106 would invalidate common law marriage after June 30, 2007. That bill and companion legislation are pending. |
| **Texas:** | Tex. Fam. Code Ann. §§ 2.401-2.404 addressing "informal marriage." |
| **Utah:** | Utah Code Ann. § 30-1-4.5. |

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claim of the surviving spouse to the elective share.

### *The "Omitted Spouse" Share*

If a deceased testator and the surviving spouse married after the testator executed his or her will, the surviving spouse may receive, as an intestate share, at least the value of the share he or she would have received if the testator had died intestate.[10] However, this amount is limited to the portion of the testator's estate, if any, that the testator did not devise outright or in trust for the benefit of a child (or a descendant of a child) who was born before the testator married the surviving spouse and who is not a child of the surviving spouse. The statute identifies the following exceptions to this general rule: (1) evidence that the will was made in contemplation of marriage; (2) the testator's expressed intent that the will is to be effective regardless of a subsequent marriage; and (3) dispositions to the spouse outside the will that are reasonably construed to be in lieu of a testamentary disposition to the spouse.[11]

### *Other Spousal Rights*

Except in the case of a decedent who nominates someone else to serve, the surviving spouse who is a beneficiary of the decedent's estate has priority over all others to serve as personal representative.[12] The surviving spouse also may assert a claim against the decedent's estate for a "family allowance" of up to $24,000,[13] and the right to an "exempt property allowance" of up to $26,000.[14] A spouse is included among the legally authorized medical decision-makers for an adult who lacks the capacity to give informed consent regarding medical care and who has no written advance directives.[15] Although the law recognizes a homestead exemption for a surviving spouse (and minor children), that exemption is not treated as an allowance for the surviving spouse or minor children.[16]

The surviving spouse may receive the deceased's entire estate free of estate taxes.[17] The surviving spouse also possesses beneficiary rights under employee plans governed by the Employee Retirement Income Security Act, unless he or she has executed a written waiver of rights to receive them.[18] These benefits create the economic incentive to claim the status of surviving spouse, even if the issue was unsettled during the decedent's lifetime.

## The Elements of Proof

In estate administration, the issue of the existence of a common law marriage usually arises when a party seeks to demonstrate the right to inherit an intestate share or to receive some other benefit payable to a surviving spouse. The proponent of the common law marriage has the burden of proving, by a preponderance of the evidence, that the marriage existed.[19] Because the claim arises after one of the parties to the purported marriage has died, there may be little direct evidence of the existence of the marriage.

Colorado courts have long recognized that the "problem" with common law marriage is its susceptibility to perjury and fraud.[20] For that reason, parties to the common law marriage should seek to memorialize their intentions and understandings in writing, which they can do with affidavits. Several Colorado cities, through their human resources offices, make the appropriate forms available to municipal employees who want their common law spouses to qualify for medical insurance.[21] Affidavits may be signed, notarized, and then recorded in the office of the clerk and recorder wherever the parties choose, providing notice to the public that the parties indeed are married. The act of recording the affidavit is particularly important, because the validity of a common law marriage requires representation to the public that the marriage exists.[22] However, when the affidavit is not made or recorded, or when no written agreement exists—which often is the rule rather than the exception—parties and courts must resort to presenting and evaluating circumstantial evidence of intent and agreement, as well as evidence that the parties represented themselves to third parties as married.

In *People v. Lucero*,[23] the Colorado Supreme Court analyzed whether the marital privilege barred the testimony of a prosecution witness against the defendant in a robbery case. The defendant argued that the trial court, in violation of CRS § 13-90-107(1)(a), had received testimony of a woman who claimed to be the defendant's common law spouse. The witness testified that she considered herself married to the defendant; that the two had held themselves out to friends as being married; that they had a child together; and that the defendant agreed with her contention that they were married.

The trial court found insufficient proof of a common law relationship, and permitted her testimony regarding a car used in the robbery for which the defendant was being tried. The Court of Appeals reversed and remanded, finding that uncontradicted evidence, as a matter of law, established the existence of the common law marriage.[24] The Supreme Court remanded the case to the trial court for reconsideration, in light of the standard it set forth for determining whether the marriage existed. The standard, according to the Court, is mutual consent and agreement manifested by conduct that gives evidence

## Common Law Marriage: Evaluating the Facts

The Denver Probate Court website[1] publishes three opinions written by Judge C. Jean Stewart that may provide insight into how a trial court evaluates fact patterns and weighs the contradictory evidence that typically characterizes common law marriage cases. It is not clear whether the strict analysis employed in the sampling of Denver Probate Court cases reflects the same reasoning that would be employed by all other District Courts.

***In re William A. Goffman***[2]

*Evidence supporting the marriage:*

- giving and receiving of rings that the parties wear
- living together
- attending holiday celebrations and family functions together
- traveling together
- failure to object when one party holds the couple out as married.

*Evidence contradicting the marriage:*

- filing income tax returns as single
- completing medical records as unmarried individuals.

*Result:* No common law marriage.

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***In re Yoshimura***[3]

*Evidence supporting the marriage:*

- cohabitation
- joint parenting of the children of the decedent's first marriage
- existence of a "familial" relationship
- the child addressing his father's partner as "mommy"
- neighbors' lack of knowledge that the parties were unmarried.

*Evidence contradicting the marriage:*

- the decedent's failure to mention to certain friends that he was married
- the decedent's failure to mention the relationship at all to other friends
- the putative wife's reference to the decedent as her "boyfriend" when she spoke to a firefighter responding to the 911 call to the couple's residence on the day the decedent died.

*Inconclusive evidence under the circumstances:*

- two references to putative wife as "wife" on insurance documents in view of conflicting evidence about the decedent's signature, and in view of the decedent's functional illiteracy.

*Result:* No common law marriage.

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***In re Robinson***[4]

*Evidence supporting the marriage:*

- the parties' cohabitation and long-term committed relationship
- sharing of domestic responsibilities
- brief, rather than extended, periods of separation
- the parties' view of the residence (owned solely by the putative wife) as a joint home
- his use of her credit cards
- her purchase of life insurance on both lives, and naming each other as beneficiaries
- her purchase of health and dental insurance for both.

*Evidence contradicting the marriage:*

- a letter written by the putative wife stating that the decedent resides in her home, but which did not identify him as a spouse
- failure of putative wife to represent that she was married when she applied for a mortgage
- the parties' identification of each other as "fiancé(e)" for purposes of obtaining life insurance policies
- consistently filing income tax returns as single individuals.

*Additional Considered Evidence:*

The court cited as particularly important the parties' supplying tax and financial information in matters governed by laws of perjury or fraud or in which misrepresentations would result in criminal penalties. The court also observed that the putative wife had asserted her own common law marriage, although, as personal representative of her mother's estate, had earlier defeated the claims of a man who claimed to be her mother's common law husband.

The court also assigned significant weight to the varied and inconsistent testimony of witnesses and a "pattern of inconsistency" attending the parties' descriptions of their marital status. It noted that documentary evidence introduced at trial showed that the parties referred to each other during the course of their relationship as "girlfriend"; "fiancée"; "friend"; "roommate"; "spouse"; "common-law spouse"; "wife"; "husband"; and the like. In one document, the putative spouse stated that the decedent was her husband but, nine months later, a few days before the decedent's death, she described her marital status as "single."

*Result:* No common law marriage.

The *Robinson* opinion highlights the importance of consistency in the parties' representations to others. The court disagreed with the petitioner's assertion that it was insignificant that she and the decedent held themselves out as married to a "small circle of friends and coworkers" when the decedent's family and others with whom they came in contact were unaware of the marriage. That evidence did not support the conclusion that the parties had agreed to be married and that, after concluding an agreement, lived in a way that would give rise to a "general, public reputation" that they were husband and wife.

The court stated:

> While the holding out as husband and wife must be clear and substantial, slight inconsistency in this regard will not destroy an otherwise valid common law marriage. . . . In all cases, however, there must be more than a holding out to a select group of people; it must be holding out to the world, or to the community at large.[5]

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1. The court's website is at http://www.courts.state.co.us/district/02nd/probate.
2. *In re William A. Goffman*, Denver Probate Court, 98 PR 801 (1999).
3. *In re Yoshimura*, Denver Probate Court, 96 PR 1216 (1997).
4. *In re Robinson*, Denver Probate Court, 94 PR 2106 (1995).
5. *Id., citing* 52 Am.Jur.2d "Marriage" § 52; *Ex Parte Threet*, 333 S.W. 2d 361 (Tex. 1960).

of the parties' mutual understanding.[25] Conduct in the form of mutual public acknowledgement of the marital relationship is "not only important evidence of the existence of mutual agreement but is essential to the establishment of a common law marriage."[26]

Superficially, the requirements are simple, but the lines between the elements themselves and evidence of those elements can be fuzzy. For example, early Colorado cases seemed to require cohabitation as an element of the common law marriage.[27] Recently, however, cohabitation is considered important—perhaps very important—insofar as it constitutes evidence of representations to third parties and of the parties' intent.[28] In the absence of a written agreement, circumstantial evidence of the parties' intent and evidence of how they represented themselves to the community becomes the key to proving the existence or absence of the marriage.

## Probate Procedure and Common Law Marriage

The probate process itself or the "spouse's" application for nonprobate benefits typically triggers the dispute over whether a decedent was married at death. A decedent's will usually identifies the decedent's marital status, but that does not necessarily prevent a putative spouse from asserting a claim. Any person may file a demand for notice under CRS § 15-12-204; a "spouse" omitted from a will then may assert his or her claims against the estate after the personal representative is appointed. In the alternative, the "spouse" may apply to open the estate for purposes of contesting a will and asserting statutory rights.

In any event, the "spouse" may claim that the marriage arose after the date of the decedent's will, or that the will incorrectly reflected that the decedent was unmarried. Regardless of whether the decedent died intestate, if an estate has been opened, the "spouse" could seek removal of the personal representative pursuant to CRS § 15-12-611 based on his or her statutory priority, and assert at that time the existence of a valid marriage. If the decedent died intestate, the "spouse" may seek to open a probate proceeding for purposes of asserting his or her rights to statutorily guaranteed shares.

In ambiguous cases, it can be useful for interested persons to address the issue directly, before probate or non-probate distributions are made, either by filing a demand for notice (being certain to include variations of the decedent's name) or by seeking to open the estate to "smoke out" a putative spouse early in the proceedings. Interested parties should notify third persons—administrators of retirement accounts and insurance benefits, for example—of any concerns that groundless demands for payment will be made on the administrator. The holder of death benefits—administrators of retirement plans, for example—may want to initiate an interpleader action and await a court order on disposition when multiple parties claim a right to payment.

If the issue of marital status will be contested, and if it appears that extensive evidence and testimony will be necessary, the parties can—and probably should—opt to treat the matter like other civil cases and request that it be subject to the Rules of Civil Procedure, with attendant case management orders and schedules for pretrial proceedings. Attorneys more accustomed to estate administration than civil litigation may wish to associate with or defer to counsel who have expertise in discovery and trial matters.

## The Dead Man's Statute

The issue of whether a decedent was married at the time of death can raise the evidentiary considerations of CRS § 13-90-102, commonly called the "Dead Man's Statute." This statute provides that, in any civil action "by or against a person incapable of testifying" (including decedents and incompetent persons), each party and person in interest with a party" may testify about oral statements made by the person who cannot testify (in this case, the decedent) if:

1) the statement was made under oath at a time when such person was competent to testify;
2) the statement is corroborated by material evidence of an independent and trustworthy nature; or
3) the opposing party introduces evidence of related communications.

A "person in interest with a party" is someone who has an interest in the outcome of the civil action "or any other interest that makes the person's testimony, standing alone, untrustworthy."[29] Clearly, the proponent of the marriage is a "person in interest with a party" under the statute; his or her testimony as to the decedent's uncorroborated "vows" or other oral representations supporting the marriage may be excluded either as the subject of a motion *in limine* before trial or as an evidentiary objection during trial.

In *In re Estate of Crenshaw*,[30] the court held that the Dead Man's Statute barred the testimony of the purported common law spouse as to her relationship with the decedent. Although the case was decided under the statute as it existed before its most recent enactment in 2002, the court's reasoning remains instructive. In *Crenshaw*, the purported spouse testified at a jury trial about her relationship with the decedent; the decedent's sons objected.

The court of appeals, in overturning the trial court's findings of a lawful common law relationship, stated that the policy un-

### Benjamin Franklin's Common Law Marriage

Founding Father Benjamin Franklin apparently was a party to a common-law marriage.[1] Franklin's putative spouse, Deborah Read, had been married to John Rogers, who ran off to the West Indies. Read apparently never divorced him and Rogers never resurfaced. The subsequent common law relationship with Franklin (as opposed to a ceremonial marriage) protected Read at the time from the crime of bigamy. Read also helped Franklin raise his illegitimate son, whose mother never conclusively was identified, raising the question of whether the common law marriage would be supported by the couple's mutual parenting—a factor currently important in Colorado. Franklin's case is distinguishable from the state of the law in Colorado in that a valid common law marriage cannot arise as long as one of the parties has an undissolved existing marriage.[2]

On the other hand, pop lyricist Frankie Lyman, whose 1956 hit ironically asked, "Why Do Fools Fall in Love?" apparently was not a common law spouse.[3]

1. Isaacson, *Benjamin Franklin: An American Life* (New York, NY: Simon & Schuster, 2003) at 74-77.

2. *See People v. Maes*, 609 P.2d 1105 (Colo.App. 1979).

3. *Lyman v. Lyman*, A.D.2d, N.Y.S.2d, N.Y.L.J., 6-8-89, at 23, col. 1 (1st Dept. 1989). *See* Brandes, "Common Law Marriages" (1989), available at http://www.brandeslaw.com/common_law_marriage/clmart.htm.

derlying the statute is to "guard against perjury by living interested witnesses when deceased persons cannot refute the testimony, thus protecting estates against unjust claims." The court went on to say that a probate contest falls within the statute "because the purpose of the suit is to divest legatees and devisees of all rights in the decedent's estate."[31] It struck down the trial court's reasoning that the Dead Man's Statute exists for the estate's benefit, such that the statute does not apply when the result of a proceeding cannot increase or diminish the estate. The appellate court instead found that, because the decedent had died intestate, the purported spouse stood to receive the marital share of the estate and, according to intestacy laws, could take an elective share that would directly diminish and adversely affect the children's shares.[32]

## Practical Pointers

Useful information about a decedent's marital status can come from a variety of sources other than neighbors, friends, or family members:

• ***Funeral Directors:*** Funeral directors assist in preparing death certificates and obituaries. They typically gather information about family histories shortly after a death occurs, and before a potential claimant has much time to reflect on whether to fabricate the existence of a marriage. Funeral directors generally meet with family members as a group. If the family knows the common law marriage exists at the time of the decedent's death, one party's identification of himself or herself as the surviving spouse will not generate surprise or dissention. If the decedent's marriage is not generally known to or acknowledged by the decedent's parents or siblings, the reaction of family members may constitute evidence that the decedent had concealed the relationship, which, in turn, may support the position that the decedent was not married.

• ***Hospital Records:*** Hospital admission records and patient charts typically reflect the facility's understanding of a patient's marital status and the identity of the individual providing the information. However, information about marital status may vary among hospital staff, including physicians, nurses, social workers, and pastoral care providers. For example, a woman claiming to be the decedent's common law wife, at various times during the decedent's hospital stay, may have referred to the same person as her husband, boyfriend, and/or fiancé. When hospital personnel are not sure if a patient is married, they may refer to him or her as a "significant other" or "SO" as opposed to a spouse. Hospital chaplains, in the course of providing bereavement counseling, may hear references to the affection of the parties, long-term relationships, or "being together" for a particular period, as opposed to being "married." Health care powers of attorney may identify the relationship between principal and agent. Medical records should be the subject of requests for production or, if necessary, subpoenas, during the pretrial discovery process to clarify third parties' understanding of marital status.[33]

• ***Emergency Responders:*** Operators for 911 systems and on-scene emergency responders often may hear accident victims and other persons in need of assistance described as "my husband" or "my girlfriend."[34]

• ***Public Records:*** A search of public records for residence addresses of each party can yield evidence to support or refute contentions that the parties resided together during their joint lifetimes.

• ***Income Tax Returns:*** Courts tend to view these documents as weighty, because the disclosure of marital status is made under oath. Typically, tax returns are the subject of pretrial requests for production and fodder for direct or cross-examination.

## Conclusion

Legitimate common law marriages exist, but proof presents difficulty, primarily because of the requirements for consistent representations to third parties and clear evidence of intent and agreement. Attorneys need to advise clients about the effect of their marital status in estate planning and estate administration, as well as the difficulties that can arise when subjective intent is not objectively demonstrated to others. Inconsistency can be fatal to the asserted existence of the marriage, or open the door for bad faith claims when, in fact, no marriage existed.



## NOTES

1. CRS § 14-2-109.

2. 52 Am.Jur.2d Marriage § 45; *McChesney v. Johnson*, 79 S.W.2d 658 (Tex.Civ.App. 1935).

3. *Taylor v. Taylor*, 10 Colo.App. 303 (1897).

4. *Klipfel's Estate v. Klipfel*, 92 P. 26 (Colo. 1907). *See also In re Marriage of J.M.H. and Rouse*, __ P.3d __, 2006 WL 1643211 (Colo.App. June 15, 2006). The court found that the Weld County District Court erred when it ruled that a person under the age of 16 must obtain judicial approval to be married, even if the marriage is a common law marriage. Because Colorado appellate courts have not determined the age of consent for a valid common law marriage, the court stated that it must look to English common law for guidance, and found that Colorado has adopted the common law age of consent for marriage as 14 for a male and 12 for a female. The Colorado Legislature responded with a bill signed on July 18, 2006, establishing 18 as the minimum age for both parties to valid common law marriage, effective September 1, 2006. The law will amend CRS § 14-2-104(3) by adding new subsections, and will create a new § 14-2-109.5.

5. U.S. Const. Art. IV § 1. However, the federal "Defense of Marriage Act" defines "marriage" as "only a legal union between one man and one woman as husband and wife," and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. 1 U.S.C. § 7. The same act provides that the states are not required to recognize the same-sex marriages recognized by any other state. 28 U.S.C. § 1738c.

6. CRS §§ 15-15-101, -212, and -102. Death, of course, can end a common law or ceremonial marriage, but there is no such thing as a "common law divorce." Dissolution of marriage is always statutory. *See* Storey, "Defending Against a Common Law Marriage Claim," 34 *The Colorado Lawyer* 69 (March 2005). *In re Peterson's Estate*, 365 P.2d 254, 255 (Colo. 1961) appears to announce a standard favoring a finding of common law remarriage when the parties "reunite(d)" after entry of the interlocutory divorce decree.

7. CRS § 15-11-102.

8. CRS § 15-11-202(2). The statute contains a lengthy definition and inclusion formula. Suffice to say that the surviving spouse's right to an elective share can be valuable, to the potential detriment of other beneficiaries.

9. CRS § 25-11-201(1).

10. CRS § 15-11-301.

11. CRS § 15-11-301(1)(a), (b), and (c).

12. CRS § 15-12-203.

13. CRS § 15-11-405.

14. CRS § 15-11-403.

15. CRS § 15-18.5-103(3).

16. CRS §§ 38-41-204 and 15-11-402.

17. IRC § 2056. Transfers of decedents' property to non-citizen spouses do not qualify for the unlimited marital deduction against estate taxes, although transfers into qualifying trusts for the benefit of the non-citizen spouse do qualify for the deduction. IRC § 2056(d).

18. *See* 29 U.S.C.A. § 1144; *In Re Marriage of Rahn*, 914 P.2d 463 (Colo.App. 1995).

19. *Valencia v. Northland Ins. Co.*, 514 P.2d 789 (Colo.App. 1973).

20. *In re Estate of Crenshaw*, 100 P.3d 568, 571 (Colo.App. 1004), *citing Azimow v. Azimow*, 255 N.E.2d 667, 670 (Ind.App. 1970), *quoting Estate of Dittman v. Biesenbach*, 115 N.E.2d 125 (Ind.App. 1953).

21. Denver, Fort Collins, Colorado Springs, and Pueblo, among others, make such affidavits available to their employees. However, an affidavit alone is not necessarily dispositive. *See In re Estate of Rodriguez*, No. 03CA542, (Colo.App. May 27, 2004), available at http://www.courts.state.co.us/district/02nd/probate (holding that although the parties to the alleged marriage had signed an affidavit attesting they were married and delivered the affidavit to the health care plan administrator, the putative wife circulated to third parties documents asserting that she was not married, including tax returns, sworn filings in federal bankruptcy court, a loan application, a job application, and a W-4 form.

22. *Valencia, supra* note 19.

23. *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987).

24. *People v. Lucero*, 707 P.2d 1040, 1042 (Colo.App. 1985).

25. *Lucero, supra* note 23 at 663.

26. *Id.* at 664.

27. *Klipfel, supra* note 4 at 27-28 provides that:

> A marriage simply by agreement of the parties, followed by cohabitation as husband and wife, and such other attendant circumstances as are necessary to constitute what is termed a common-law marriage, may be valid and binding.

*See also Taylor v.* Taylor, 10 Colo.App. 303, 304-05; *Graham v. Graham*, 274 P.2d 605 (Colo. 1954).

28. *Lucero, supra* note 23 at 664-65.

29. CRS § 13-90-102(3)(b).

30. *In re Estate of Crenshaw*, 100 P.3d 568 (Colo.App. 2004).

31. *Id.* at 569.

32. *Id.* at 570.

33. C.R.E. 803(6) and (7) relate to records of regularly conducted business activities and the absence of entries in regularly conducted business activities, respectively. Existence or absence of an entry in a business record as it relates to marital status constitutes an exception to the hearsay rule.

34. C.R.E. 803(1) and (2), relating to spontaneous present sense impression and excited utterance, respectively, constitute exceptions to the hearsay rule and may apply in cases involving first responders. n