SETTLING PROBATE MATTERS WITH MINORS

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I. Introduction

Administration of a probate estate can involve minor beneficiaries in a variety of ways. The purpose of this outline is to review some alternatives for making distributions, appointing fiduciaries if necessary, the creation of trusts, and executing settlement agreements. It is best if the decedent's Will, beneficiary designations, and other dispositive documents plan for the young age of beneficiaries. If not, Colorado statutes provide some alternatives for making distributions. These same alternatives can in many cases also apply to incapacitated adult beneficiaries, but the focus of this outline is on minors.

Keep in mind that only persons age 18 and older can legally own title to property, and sign documents, such as the Receipt and Release forms (JDF 731) acknowledging receipt and releasing the personal representative from liability for the distribution. C.R.S. §13-22-101 (a person is deemed to be of full age at 18).

See also C.R.S. § 15-12-915 that authorizes a personal representative to discharge his obligation to distribute to any person under legal disability by distributing (a) to the person's conservator; (b) to any person authorized by law to give a valid receipt and discharge for the distribution (which could include someone appointed under another state's law that is not technically a conservator); (c) to a parent or relative having custody of the person subject to court order and terms and conditions as the court shall direct; or (d) under the Colorado UTMA (see discussion below that a court order is required for any distribution more than $10,000).

II. Trusts for Minors

A. *Testamentary Trust*. The decedent's Will may create a trust for the benefit of one or more minor beneficiaries. This is one of the least expensive ways to appoint a fiduciary (the trustee) to accept and administer property for the benefit of a minor beneficiary. In order to create the trust, the following checklist could be followed:

- Have the Will admitted to probate (but see discussion below if there is otherwise no need for probate and nonprobate assets are payable to a trust created in the Will)

- The Trustee should sign an Acceptance of Appointment
- Register the Trust if the trust is administered in Colorado (the trust records are maintained here) (*See* JDF 732)
- Obtain a Tax Identification Number from the IRS for the trust (*See* IRS Form SS-4)
- We recommend preparing a Memorandum for the trustee summarizing the terms of the trust and reviewing the duties of a trustee
- Open one or more accounts in the name of the trust, with the trustee as signer, to receive assets payable to the trust. Often, the bank or investment company will require receipt of a copy of the Will creating the trust.
- Have the trustee sign the Receipt and Release form to acknowledge receipt of the trust's share of the estate (*See* JDF 731).

Because there is usually no continuing court supervision of a trust in Colorado, creating a trust in the Will for minor beneficiaries is often the most cost-effective and efficient manner of setting aside property for the benefit of minor beneficiaries. A discussion of the duties of a trustee is outside the scope of this outline.

B. *Distribution to Testamentary Trust if no Probate*. Sometimes the decedent's Will creates a testamentary trust for the minor beneficiaries, but there are no probate assets requiring the opening of a probate estate. If there is life insurance payable directly to the "Trustee under the Insured's Will," then the life insurance company may require that the Will be admitted to probate before it will pay the proceeds to the trustee named in the Will. Going through the expense of a full probate proceeding that would not otherwise be necessary can seem to unfairly penalize the minor through payment of additional fees and costs. While I believe that the company is technically correct to require that the Will be admitted to probate (to be determined to be the valid "last Will" of the decedent) before paying the proceeds, I have been successful in some cases to have the proceeds paid to the trustee upon submission of a Trust Registration Statement to the insurance company. In addition, the Colorado statutes governing informal probate contemplate a proceeding to admit the Will only, without appointment of a personal representative (and without having to publish Notice to Creditors, file an Information of Appointment, prepare an Inventory and all of the other required duties of a personal representative is appointed). *See* C.R.S. § 15-12-301 that discusses "Application for informal probate *or* informal appointment of a personal representative." JDF Form 910 does not clearly give the preparer a choice of admitting the Will only, and not appointing a personal representative, so you will have to revise the Application and the Order in that case.

C. *Revocable Trust*. If the decedent had a "pour over" Will funding a revocable trust, then the trust for minor beneficiaries may be created in the separate revocable trust document. If there are life insurance proceeds or other nonprobate assets payable to the trust for the minors under the Revocable Trust, then the following checklist should be followed:

- The Trustee should sign an Acceptance of Appointment

- Register the Trust if the trust will be administered in Colorado (*See* JDF 732)
- Obtain a Tax Identification Number from the IRS for the trust (*See* IRS Form SS-4)
- We recommend preparing a Memorandum for the trustee summarizing the terms of the trust and reviewing the duties of a trustee
- Open one or more accounts in the name of the trust, with the trustee as signer, to receive assets payable to the trust. Often, the bank or investment company will require receipt of a copy of the trust agreement creating the trust.

D. *Irrevocable Trust*. The decedent may have created an irrevocable trust for the benefit of the minor beneficiaries during lifetime. If so, then there may be life insurance or other benefits payable to the trustee of that trust. Funding the trust and actually setting up separate trust shares for multiple beneficiaries will follow the same steps as listed above for the trusts created under a revocable trust agreement.

III. **Direct Gifts to Minors**. The Will may include gifts to beneficiaries who are minors, without specifically creating a trust for those beneficiaries. There are several alternatives available to the personal representative.

A. If the Will contains a *Distribution Alternatives* clause similar to the one included in *Colorado Estate Planning Form* (the Orange Book), then the personal representative may use any of the listed alternatives, which can include distributing the proceeds (1) to the trustee of a trust already created for that beneficiary; (2) to a custodian under the Uniform Transfers to Minors Act; (3) to a 529 Plan Account for the beneficiary; or (4) to another fiduciary for the benefit of the beneficiary. The Orange Books forms *Distribution Alternatives* clause reads as follows, as augmented by my suggestions in **bold**:

> DISTRIBUTION ALTERNATIVES: My fiduciaries may make any payments under my will or any trust under my will: (a) directly to the beneficiary; (b) in any form allowed by applicable state law for gifts or transfers to minors or persons under disability; (c) to the beneficiary's guardian, conservator, or caregiver for the benefit of the beneficiary; and (d) by direct payment of the beneficiary's expenses. A receipt by the recipient for any such distribution, if such distribution is made in a manner consistent with the proper exercise of my fiduciaries' duties hereunder, shall fully discharge my fiduciaries.
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> *We usually include the following additional alternatives*: **(e) to any other person deemed suitable by my fiduciaries who is under a fiduciary obligation to apply the distribution solely for the benefit of the beneficiary; (f) directly for the benefit of the beneficiary; (g) in the case of a minor beneficiary, to any person selected or approved by the trustee as owner of a Section 529 Plan**

Account for the benefit of that beneficiary, provided that the beneficiary shall become the owner of that account at age 21.

B. If the Will contains a "default" trust for the benefit of anyone under a certain age or an incapacitated person, then the personal representative may create such a trust using the steps outlined above for a specific testamentary trust. The following is an example of such a clause from the Orange Book:

> DISTRIBUTION TO DISABLED PERSONS OR PERSONS UNDER 21: If any beneficiary to whom the personal representative is directed to distribute any share of the estate is under the age of 21 years or is, in the opinion of the personal representative, under any disability which renders such beneficiary unable to administer distributions properly when the distribution is to be made, the personal representative, in its discretion, may continue to hold such beneficiary's share as a separate trust until he or she reaches the age of 21 years, or overcomes the disability, when the personal representative (referred to in this section as the "trustee") shall distribute such beneficiary's trust to him or her.
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> (a) While any trust is being held under this paragraph, the trustee may distribute to, or apply for the benefit of, the beneficiary for whom the trust is held such amounts of the net income or principal, or both, as the trustee may determine in its sole and absolute discretion. Any undistributed net income may be added to principal from time to time in the discretion of the trustee. The trustee shall exercise its discretion in such a manner as to maximize medical or public assistance benefits, and shall not enter into any agreement with any representative of a medical or public assistance program or governmental entity which compromises such beneficiary's continued care or eligibility for services in or from any public or private institution or facility. The trustee's discretion shall be absolute and binding on all persons, including any organization providing benefits to the beneficiary.
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> (b) Upon the death of such beneficiary before he or she attains the age of 21 years or before his or her disability ceases, the trustee shall upon such beneficiary's death distribute the remaining balance of the trust to [***special power of appointment in Will could be added***] his or her then living descendants, by representation, or if none, to the personal representative of such beneficiary's estate, to distribute as part of the estate.

C. If the Will does not include either the *Facility of Payment* clause or a default trust for a minor, then C.R.S. §11-50-107(3) authorizes a personal representative to make

a minor beneficiary's distribution to a custodian under the Colorado Uniform Transfers to Minors Act, but the transfer must (1) be in the best interests of the minor, (2) not be prohibited by the Will, and (3) be authorized by the court if more than $10,000. A UTMA account will stay under the control of the custodian until the beneficiary reaches age 21 under C.R.S. §11-50-121. You may also want to consider creation of a Uniform Custodial Trust account under C.R.S. § 15-1.5-101, *et seq.*, that has a dollar limit of $30,000 as opposed to $10,000 for a UTMA account distribution without court authority. A Uniform Custodial Trust account is distributed to the minor at age 18.

D. If the distribution under the Will is more than $10,000 (or $30,000 if the Custodial Trust account is used), then the Court may require the opening of a conservatorship estate for the minor under C.R.S. §15-14-401 et seq. If the beneficiary is under age 18 at the time of the distribution, and the court requires a conservatorship to be created, the conservatorship lasts until the beneficiary is age 21, not age 18. Depending upon the age and amount at issue, the personal representative may be able to wait to make the distribution to a beneficiary who is age 17 at the decedent's death, but turns 18 before the estate is to be distributed. In that way, the cost and expense of a conservatorship could be avoided. But the beneficiary also would not have the protection available in a conservatorship, so the personal representative must weigh all of those factors.

E. As opposed to a full conservatorship, there are situations where a "single transaction" can be authorized by the court under C.R.S. §15-14-412. In such a proceeding, a conservator is not appointed, but a remedy may be fashioned for the court to approve distribution of the gift to a suitable entity or person for the benefit of the minor beneficiary. This is the statutory section that authorizes the court to approve settlement of a personal injury claim on behalf of a minor beneficiary, but it can be used in other situations, including the example, below, of life insurance payable to a minor where a testamentary trust is created in the Will.

IV. **Life Insurance and Other Contractual Benefits Payable to a Minor**. It is relatively common to discover in the course of an estate administration that minor beneficiaries were named as direct beneficiaries of life insurance, annuities, or retirement accounts. Online beneficiary forms often do not "permit" naming the trustee under a Will, and require a name, birthdate, etc. A client's other advisors sometimes are not familiar with the problems inherent in naming the minor children as direct beneficiaries. Usually, the insurance company or IRA custodian will require that Letters of Conservatorship be issued by a Court before the proceeds will be paid.

A. Because these benefits are based on the governing contracts, if the contract provides for a UTMA type of payment, or a facility of payment alternative to the testamentary trust, then the proceeds may be collected without opening a conservatorship. It is worthwhile to have a conversation with the company, and to review the policy and/or IRA contract to determine if there are any alternatives to incurring the expense to open a conservatorship. The costs of the conservatorship should not be paid by the general estate, unless the minor beneficiary is the

residuary beneficiary.

B. A full conservatorship proceeding is expensive, even if there are no family conflicts over who to name as conservator. A hearing before the judge or magistrate is required (unlike informal probate), annual reports are required to be filed, an Inventory and Financial Plan must be filed, and there are restrictions on moving the minor beneficiary out of state without court approval.

C. If the Will creates a trust for the minor beneficiaries, then it may be possible to file a Petition for a Single Transaction proceeding authorizing the deposit of the proceeds into the testamentary trust, rather than to a conservator in a full conservatorship proceeding.

D. Social Security will pay a minor's benefits to a "legal representative," without requiring the appointment of a conservator in a state court proceeding. These benefits are separate from any conservatorship estate, although the amount of benefits will be listed in the financial reports filed by the conservator. Usually a child will receive Social Security based on a deceased parent's benefits until age 18, and longer if the child is disabled. In addition, a person caring for the minor (possibly the surviving parent) may also receive Social Security until the minor is age 16. Details about benefits may be obtained from www.ssa.gov.

V. Settlement of a Controversy. If the estate administration involves a controversy as to shares, interests, terms of documents, etc., and if a minor's interests are involved, it may be necessary to have a Guardian ad Litem (GAL) appointed for the minor. The minor cannot sign and be bound by a Settlement Agreement. However, in some situations, virtual representation as codified in the Colorado Probate Code may apply and bind the minor, but only when there are no conflicts of interest between the minor and the person representing him or her. C.R.S. § 15-10-403(3)(c) provides that:

> "If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent his minor child, and where there is such representation orders binding the parent bind the minor child."

Similarly, C.R.S. § 15-10-403(3)(b) makes clear that so long as there is no conflict of interest, a conservator or guardian for the minor will bind the minor.

Subsection (5) of this statute provides for the appointment of a GAL if necessary to represent a minor. Where there is a conflict of interest with the minor's parent in the proceeding, then it is best to petition the court to appoint a GAL so that the Settlement Agreement can be signed and legally bind all parties. Usually the GAL is a probate attorney, in our experience.

VI. Coordinating a Guardianship and the Probate Proceeding. As noted above, it is often necessary to have a conservatorship opened for a minor beneficiary in an estate where a trust for the beneficiary is not created in the dispositive documents. If both parents of the minor

have died, then it also may be necessary to have a guardian appointed. A full discussion of that procedure is outside the purpose of this outline, but a few points should be noted.

A. *Jurisdiction*. Both the family law courts and the probate courts can have jurisdiction over the care and custody of a minor child. While the probate court may appoint a legal *guardian*, the family law court usually addresses custody, visitation, and similar issues. If the minor is at least age 12, he or she has the authority to consent or refuse to consent to the appointment of a certain individual as guardian. C.R.S. § 15-14-203. In the family law proceedings, the court will consider the best interests of the child, but there is no statutory right for the child to refuse to consent to the appointment. Sometimes it is best to obtain both a custody order and a guardianship order, especially if there is a lot of conflict among the surviving family members.

B. *Choice of Guardian*. The deceased parent(s) may have appointed a guardian in their Wills or another separate writing. A Petition for appointment of the designated person must still be filed, and Letters of Guardianship obtained for the person to have legal authority to act. However, this designation is not necessarily binding on the court. The court retains the authority to determine who should have care and custody of the child, in the best interests of the child. *See In Re: R.M.S.*, 128 P.3d 783 (Colo 2006).

C. *Guardian vs. Conservator*. A conservator usually handles the financial affairs of the minor (including receiving assets from an estate or proceeds of life insurance payable to a minor; C.R.S. § 15-14-425) and a guardian usually handles the personal matters for the minor, such as where the minor will live, what school the minor will attend, medical treatment decisions, and the like. C.R.S. § 15-14-208. If no conservator has been appointed, then unless the court orders otherwise, a guardian can spend money for the benefit of the minor, conserve funds for the minor's benefit, or apply for benefits.

VII. Effect of Divorce. A prior divorce can affect the administration of an estate in a variety of ways.

A. *Revocation on Divorce Statute*. C.R.S. § 15-11-804 provides that revocable provisions in dispositive documents are automatically revoked upon entry of a divorce decree in many instances. These include:

- gifts to the former spouse in a Will or revocable trust
- nomination of the former spouse *or members of his or her family* as a fiduciary (such as trustee for minor children)
- Joint interests are severed into tenancies in common
- Naming a former spouse as beneficiary of life insurance or other contractual benefits

In *Estate of DeWitt*, Case No. 01SC136, September 9, 2002, the Colorado Supreme Court ruled that this statute is constitutional. In that case, the insurance beneficiary designation and divorce occurred prior to July 1, 1995, and the death occurred after the effective date of UPC II. The Colorado Court of Appeals had ruled the statute was unconstitutionally retroactive and impaired contracts, for divorces occurring prior to the effective date. In another case, *Estate of Becker*, a different panel of the Colorado Court of Appeals ruled the statute was constitutional under the same facts. The Colorado Supreme Court ruled in favor of application of the statute.

Notwithstanding the terms of C.R.S. § 15-11-804 that revokes the designation of a former spouse as beneficiary, ERISA overrides this state law provision for qualified plans and life insurance that is part of an ERISA plan. In *Metropolitan Life Insurance Company v. Hanslip*, 939 F.2d 904, (10th Cir. 1991), the Court held that ERISA preempted an Oklahoma statute with respect to life insurance proceeds distributed from an ERISA plan. The insured had named his spouse as beneficiary of the policy, and had not changed the designation after their divorce. He died six months later. Under Oklahoma statute, a divorce revoked beneficiary designations to the former spouse, similar to Colorado's §15-11-804. The Court held that because the policy related to an ERISA plan, federal law preempted the state statute, and the proceeds were properly paid to the former spouse, as the designated beneficiary. The U.S. Supreme Court held that a statute similar to C.R.S. §15-11-804 is preempted by ERISA. See *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001). Based upon the same principles, in the recent *Kennedy v. Plan Administrator of DuPont,* 555 U.S. ____ (No. 07-636_, 129 S. Ct. 865 (2009), the U.S. Supreme Court ruled that a plan administrator for an ERISA plan correctly distributed the plan proceeds to the former spouse who was still named as beneficiary, even though the former spouse had waived these benefits in the divorce action. Even though the court ruled that a QDRO was not required, the waiver did not meet the requirements of a valid disclaimer *in the plan document,* so the waiver was not effective.

In addition, Colorado's PERA will often refuse to honor revocation of the beneficiary by divorce decree; in a letter from a few years ago, PERA's position was that the "more specific" statute of §24-51-905(2) governs the payment of PERA benefits on a participant's death. That statute sets out who is to receive a deceased member's account: "(a) to the surviving spouse; (b) to the named beneficiary if no surviving spouse; (c) to the estate of the deceased member if neither of the persons specified in paragraphs (a) or (b) of this subsection (2) exists." Therefore, if the member signed a beneficiary designation naming the spouse, a later divorce does not revoke that designation under §15-11-804, according to PERA.

The effect of the divorce decree can mean that if the Will has not been updated after the divorce, then if the former spouse or members of his or her family were named as trustees for the children, there may be a vacancy in the trustee and the court will have to be petitioned to appoint a trustee. Exhibit H is an example including appointment of the ex-

spouse and his parents as trustees in the Will, which left a vacancy in the position of trustee. Also, if the former spouse was named as beneficiary on life insurance with minor children as contingent beneficiaries, then if the divorce revokes the spouse as beneficiary, a conservatorship may be required to collect the proceeds for the minor children.

It is always best to update an estate plan after a divorce to deal with these issues. There are many situations where the ex-spouses still want to name certain family members as trustee for the children, and do not want those appointments revoked.

B. *Claims under Decree*. In addition to the effect on gifts or appointments of fiduciaries after a divorce decree is entered, the decree will often require one or both spouses to name the spouse and/or children as beneficiaries of life insurance or retirement accounts, and the division of property between the spouses will be a part of the decree. If any of those court orders have not in fact been fulfilled prior to the decedent's death, then the surviving ex-spouse and/or the children will have a claim against the estate of the deceased spouse. In addition, for minor children, there probably is an order of child support, and such claims survive the death of the parent, unless otherwise provided in the separation agreement. *In re Icke*, 189 Colo. 319, 540 P.2d 1076 (1975). A claim should be filed in the deceased parent's estate for the remaining balance of the child support owed. **Note that there are time limits on filing claims** in C.R.S. § 15-12-803 (four months after first publication of Notice to Creditors, or in any event one year after the date of death, if a known creditor).

Usually the payment of maintenance will terminate on the death of the spouse, but the Separation Agreement may provide otherwise, so the Agreement and divorce decree should be reviewed. Under Internal Revenue Code §71, one of the requirements for "alimony" (that is deductible by the payor spouse and taxable to the payee spouse) is that it terminate on the death of the payee spouse. In *Ferguson v. Olmsted*, 168 Colo. 374, 451 P.2d 746 (1969), the Colorado Supreme Court held that the obligation to pay alimony ends with death, but the statute was amended to specifically authorize an obligation to carry life insurance to cover the payment of maintenance. *In re Koktavy*, 44 Colo. App. 305, 612 P.2d 1161 (1980).

There can be many obstacles to collecting funds to actually satisfy claims under a divorce decree, including:

- There may not be any probate estate, especially if the deceased ex-spouse has re-married and all assets are titled in joint tenancy with the new spouse, and in order to file a claim the claimant may be forced to open the estate under C.R.S. § 15-12-104 and 15-12-804.
- Claims under a divorce decree are usually in the class of general, unsecured creditors (C.R.S. § 15-12-805)
- Only certain nonprobate assets are available to pay claims, under

C.R.S. § 15-15-103. These assets do not include joint tenancy real estate, life insurance proceeds or retirement accounts (usually the main assets).

- Allowances payable to the new surviving spouse will take priority over general claims, although any minor or dependent children may still have a right to a portion of the Family Allowance under C.R.S. § 15-11-404.

It is common that the divorce decree will require certain insurance to be payable to the children, or that gifts to the children be made in each spouse's Will, without including any time limitation on this requirement. If the requirement is really meant to secure a child support payment, and thereafter the parent will be free to change the beneficiary, that should be made clear in the Separation Agreement. If there is no termination date, then a claim can arguably be made even after the child is an adult for those benefits.

VIII. Allowances. As mentioned above, a spouse and dependent children are entitled to request a portion of the Family Allowance under C.R.S. § 15-11-404, and if there is no surviving spouse, dependent children are entitled to request the Exempt Property under C.R.S. § 15-11-403. Effective January 1, 2012, each allowance is $30,000 for a total of $60,000, but these amounts are indexed for inflation. The 2015 figures were $32,000 each.

IX. Changes to Definition of "Child" under the Colorado Probate Code; Pretermitted Children.

A. Prior to July 1, 2010, the definition of "child" in the Colorado Probate Code referred generally to the definitions of parent and child in Colorado's version of the Uniform Parentage Act. In addition, an adopted child usually had only one set of parents for inheritance purposes, and only if there were no other heirs, would a birth child inherit from a deceased parent, to avoid having the estate escheat to the state of Colorado. Effective July 1, 2010, the rules for defining parent and child for inheritance purposes are contained in the Colorado Probate Code (C.R.S. § 15-11-114 through C.R.S. § 15-11-122), and much more detail is added for children born from assisted reproduction techniques, and for adopted children. Perhaps one of the most important changes is recognizing as a "child" someone conceived after the decedent's death, so long as the child is born within 45 months after the decedent's death.

The statutory definitions of children and grandchildren are default rules only, and can be changed in Wills or Trusts. Class gifts in Wills and Trusts follow these same new default rules, with respect to posthumously conceived children, children born of assisted reproduction techniques, and adopted children, unless the definitions are specifically changed in the documents. The effective date provisions in C.R.S. § 15-11-701(3) clarify that the new rules apply only to

governing instruments executed or republished on or after July 1, 2010.

For a comprehensive discussion of the new inheritance rules and the definition of a "child" *see* Bryant, Willoughby & Wood, "Changes to Colorado's Uniform Probate Code," 30 *The Colorado Lawyer* No. 12 (December 2010), p. 41.

B. If a Will was executed prior to the birth or adoption of a child, then C.R.S. § 15-11-302 provides that the omitted child will take his or her intestate share, subject to certain exceptions. First, if the testator did not have any children when the Will was executed, then the children will receive their intestate shares unless the Will gives substantially all of the assets to the child's other parent and that parent survives. If the testator had living children when the Will was executed, then the after-born or adopted children share in the gifts made to the living children. The children will not receive their intestate share if it appears the omission was intentional or they are otherwise provided for (such as through life insurance).

C. The intestate share of a person's descendants under the revisions to the Colorado Probate Code are in C.R.S. § 15-11-103. Generally, the descendants take the portion of the intestate estate, per capita at each generation, that does not pass to the surviving spouse or a Designated Beneficiary.

A Designated Beneficiary under C.R.S. § 15-22-101 et seq. takes all of the intestate estate if there are no descendants, and one-half of the intestate estate if there are living descendants.

A surviving spouse's share is a little more complicated. The spouse takes the entire estate if there are no living descendants, or if all descendants are also descendants of the spouse. The spouse takes the first $300,000 plus 3/4 the balance if there are no living descendants, but a parent of the decedent survives. The spouse takes the first $225,000 plus ½ the balance if the spouse has descendants who are not descendants of the decedent. The spouse takes the first $150,000 plus ½ the balance if any of the decedent's descendants are not descendants of the spouse. These dollar amounts are adjusted for inflation.