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WHAT'S RIGHT IS WRONG AND WHAT TO DO ABOUT IT AFTER *OLDHAM V. OLDHAM*

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I. INTRODUCTION

In *Oldham v. Oldham,* the New Mexico Supreme Court confronted a strange, but not-too-uncommon, set of facts in the realm of divorce litigation.[1] David and Glenda Oldham filed for divorce after twenty-three years of marriage, but before a final decree of divorce could be entered, David died from brain cancer.[2] Aware of the cancer but prior to their separation, David and Glenda jointly executed a will and a trust.[3] The trust appointed either spouse as trustee, and the will nominated Glenda as personal representative of David's estate and directed that his property pass to the trust.[4] Given this set of facts, the court was left with the peculiar question of which laws to apply in this instance, probate or divorce? The answer to this question would be the difference between upholding or denying the validity of the will and trust. The New Mexico Supreme Court looked to a recently enacted statute, Section 40-4-20(B) of the Domestic Affairs Code, for guidance.[5] This statute directly addresses the division of marital property in cases where one party to a pending divorce action dies.[6] Section 40-4-20(B) permits the domestic court to continue the division of marital property upon the death of one of the divorcing parties and prior to the entry of a final decree as if both parties had survived.[7]

New Mexico's approach goes against the grain of most jurisdictions, which adhere to the common law rule of abatement. It states that, "[w]hen a party to a dissolution action dies before the entry of a decree, the marriage terminates as a matter of law. The court divests of jurisdiction over the matter, including any property rights, as they are incidental

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1. Oldham v. Oldham, 2011-NMSC-007, 149 N.M. 215, 247 P.3d 736.
2. *Id.*
3. *Id.* ¶ 3.
4. *Id.*
5. NMSA 1978, § 40-4-20(B) (1993, amended through 2011).
6. *Id.*
7. *Id.*

to a final decree of dissolution."[8] New Mexico's domestic affairs statute circumvents common law and the majority view by applying the laws of divorce over the laws of the estate when a party to a pending divorce dies before the final decree can be entered.[9] The New Mexico Supreme Court determined that, even though the courts retains jurisdiction to conclude property division, such jurisdiction does not allow a court to grant a posthumous divorce that would result in the revocation of the will and trust.[10] This outcome centers on the interpretation and interaction of New Mexico's Domestic Affairs statute[11] and its Uniform Probate Code.[12]

This note explores the lengthy and multifarious history of property division law and the rise of equitable distribution in common-law states, then compares divorce and estate laws. This note then follows *Oldham*'s journey through New Mexico's court system, thoroughly explaining the supreme court's opinion. Next, it inspects *Oldham* through the lens of history and equity, and suggests that the court's outcome frustrates the public policy behind New Mexico's Domestic Affairs statute. But, this note points out, the court was left with few alternatives. The Uniform Probate Code's own language conflicts with itself, especially in relation to the Domestic Affairs statute. This note suggests language that could be added to correct this conflict. Finally, this note explores the ramifications of *Oldham* and offers advice for attorneys practicing divorce and estate law in New Mexico.

II. HISTORY

The facts and outcome of *Oldham* invoke centuries of history in divorce and property division law. To appreciate why New Mexico's Domestic Affairs statute is unique, it is useful to study the early and late history of property division in the event of a death or a divorce in America. In so doing, it becomes easier to visualize the evolutionary phases that have slowly molded American law to its current shape. Further, history can help us better understand the construct that the New Mexico Legislature might have been contemplating when penning Section 40-4-20(B).

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8. Anthony Bologna, Comment, *The Impact of the Death of a Party to a Dissolution Proceeding on a Court's Jurisdiction Over Property Rights,* 16 J. AM. ACAD. MATRIMONIAL L. 507, 507 (2000) (footnotes omitted).

9. *Id.*; NMSA 1978, § 40-4-20(B).

10. Oldham v. Oldham, 2011-NMSC-007, ¶ 29, 149 N.M. 215, 247 P.3d 736, 746.

11. NMSA 1978, § 40-4-20(B).

12. NMSA 1978, § 45-2-507, 508, 802, 804 (2011).

A. Early American Law: Title Theory

At the inception of American marital property law, two different and competing systems took shape: the common law system and the community property system.[13] Early common law merged the wife's legal rights with the husband's upon marriage, virtually resulting in the erasure of the wife's legal existence.[14] With the perception of women not owning a legal identity, coupled with the view that all property of the marriage belonged solely to the husband, there was little incentive or desire to develop property division laws.[15] As a result, women's property rights were essentially nonexistent until the 1880s, when women began to challenge the status quo.

Beginning in 1835, state legislatures in the U.S. began enacting laws to protect women's property rights.[16] These acts ushered in the era of "title theory," where married women could legally own property, and in the event of a divorce, they regained their legally owned property.[17] Nonetheless, this progression was largely nominal as economic and cultural factors still restricted most women from ever acquiring property.[18] As one authority noted, "[t]he achievement of legal status by women was for many the granting of title without office."[19]

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13. Merrie Chappell, *A Uniform Resolution to the Problem a Migrating Spouse Encounters at Divorce and Death*, 28 IDAHO L. REV. 993, 993 (1992).

14. *See* Kenneth W. Kingma, *Property Division at Divorce or Death for Married Couples Migrating Between Common Law and Community Property States*, 35 ACTEC J. 74, 77 (2009). Even the wife's prior possessions passed to the husband's personal representatives upon her death. BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY, 4 (3d ed. 1994).

15. TURNER, *supra* note 14. This perception was augmented by cultural views on the nature of marriage at that time. Marriage was viewed as a lifelong commitment ordained by God so that divorces were not permitted, and only in extraordinary circumstances was a legal separation granted. *Id.*

16. *See* Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807, 817 (1990).

17. *See* Kingma, *supra* note 14 at 78.

18. H. Foster, in the Preface to I. Baxter, MARITAL PROPERTY, p. vi, n. 7 (1973). A prominent advocate for women's equality during this time was Matilda Gage, who, speaking at a women's rights state convention in New York after the first two of its Married Women's Property Acts had been enacted, complained that a wife has no management in the joint earnings of herself and her husband; they are entirely under control of the husband, who is obliged to furnish the wife merely the common necessaries of life; all that she receives beyond these is looked upon by the law as a favor, and not held as her right. Wenig, *supra* note 16.

19. Foster, *supra* note 18 (in fact, many courts were reluctant to interpret the newly enacted statutes liberally, forcing many legislatures to pass a series of statutes removing specific disabilities of coverture).

B. Community Property

French and Spanish notions of property possession and division were at odds with English and American philosophies. France and Spain adopted the Germanic precedent, referred to as "community property," which gave spouses an equal interest in the marital community.[20] This meant that property acquired during the marriage was divided equally between husband and wife upon death or divorce.[21] By the late nineteenth and early twentieth centuries, eight western states followed the community property theory, New Mexico among them.[22]

To be sure, though, the community property theory was not entirely free of inequities. For example, if one spouse brought a particularly large amount of property to the marriage, he or she might be deprived of proportionately more property upon divorce than the other spouse. Recognizing the imbalance, a dual classification system was adopted by community property states.[23] Property acquired during marriage was considered community property, while property owned by either spouse before the marriage was considered separate property and was owned by the spouses in their individual capacities.[24] Upon divorce, only community property was divided equally, while separate property was divided according to legal title.[25] As one judge opined in 1928, community property

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20. *See* Kingma, *supra* note 14, at 75 n. 8. Explaining the existence of community property in Germanic tribal codes of the seventh and ninth centuries, the authors note that:

> [A]mong some migratory and nomadic peoples which led a hard and dangerous existence, the wife shared with her husband its dangers and vicissitudes, she was fully cognizant of the details of and shared in his daily life and labor, she lingered on the edge of the battlefields to succor him from or to help him to despoil his enemies, she was side by side with him on dangerous migrations, and took equal part in his councils; among such races the wife was fully recognized as an equal partner. Such a race was that of the Visigoths and indeed most of the Germanic tribes, including the Angles and Saxons, among all of whom the community property system was to be found in varying forms.

W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 30 (2d ed. 1971).

21. *See* Kingma, *supra* note 14, at 78.

22. *See* Wenig, *supra* note 16, at 819. The eight community property states were admitted to statehood over the span of one hundred years, from 1812 to 1912. *Id.* Louisiana was admitted as the eighteenth state in 1812, Texas as the twenty-eighth in 1845, California as the thirty-first in 1850, Nevada as the thirty-sixth in 1864, Washington as the forty-second in 1889, Idaho as the forty-third in 1890, and New Mexico and Arizona as the forty-seventh and forty-eighth in 1912. *Id.*

23. TURNER, *supra* note 14, at 5.

24. *Id.*

25. *Id.* As one might expect, alimony was a less pressing matter in community property states. In fact, Texas refused to recognize the concept at all on the grounds

theory was a "long step toward that juster and more equal status which the present condition of society demands . . . Here would seem to lie a promising field for the Commissioners on Uniform Laws."[26] Alas, uniformity would be a long time coming.

C. The Rise of Equitable Distribution

Two cultural and economic changes sparked the overwhelming resistance to existing divorce laws in America. First, a larger number of women were starting to enter the workplace and earn substantial incomes, thus contributing more to the marital partnership.[27] Second, cultural views on marriage began to change.[28] The sanctity of marriage was no longer unequivocal; instead, it became more socially acceptable for a dissatisfied spouse to seek a termination of the marriage.[29]

Visible progress remained elusive, though. Many judges obstinately held on to old patriarchal applications of property division, while societal transformations urged for more-equitable divorce laws.[30] One of the foremost authors on such subjects observed that the "overall situation therefore resembled a closed pressure cooker: as social and economic changes stoked the fire hotter and hotter, conservative state court judges refused to lift the lid. The stage was set for a revolution in American divorce law."[31] The revolution started in earnest with the promulgation of the Uniform Marriage and Divorce Act (UMDA) of 1970.[32] Unlike the previous legislative attempts, the UMDA enforced division standards and

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that it violated to public policy. *See, e.g.*, McBride v. McBride, 256 S.W. 2d 250 (Tex. Civ. App. 1953) (discussing history of alimony in Texas). Most other community property states continued to apply some form of alimony for the obvious fact that, during that time, many women rarely owned substantial amounts of property before the marriage. Without alimony, some divorced women faced complete impoverishment. TURNER, *supra* note 14, at 5.

26. Charles Summer Lobingier, *The Marital Community: Its Origins and Diffusion*, 14 A.B.A. J. 211, 218 (1928).

27. *See* TURNER, *supra* note 14, at 9–10

28. *See id.*, at 10.

29. *See id.*

30. *See* Roberts v. Roberts, 101 So. 2d 884, 886 (Fla. Dist. Ct. App. 1958) (refusing to hold that homemaker services were calculable even though they were "quite arduous"). Judges employed many other justifications for awarding meager sums to wives pre-1970; for example, one judge balanced his decision of denying alimony by noting that, "[o]ne consoling fact in favor of Mrs. Frank is that she has almost complete custody of the baby,—the possession of a jewel far more precious than the gems and clothing she claims . . . or the desire for more alimony." Frank v. Frank, 419 P.2d 199, 200 (Utah 1966).

31. *See* TURNER, *supra* note 14, at 11.

32. Uniform Marriage & Divorce Act § 307 (1970).

adopted a dual classification system similar to that of community property law.[33] Overall, the UMDA sought to define community property as any property gained subsequent to the marriage—gifts and inheritances excluded—and to divide the marital property into just portions.[34] As predicted, the UMDA faced fierce opposition and was not adopted by many states; nonetheless, because of its serious intent and specific language, the UMDA can fairly be regarded as the first "equitable distribution" statute because it sought to divide property gained during the marriage into fair portions.[35]

Today, "equitable distribution" statutes are in place in every non-community property state, led in large part by proactive rights movements and radically changing perceptions of marriage. As one author has observed:

> When Ronald Reagan became Governor of California, marriage was, at least in theory, a lifetime bond that could be dissolved while both parties were alive only if one spouse was guilty of bad behavior such as adultery, cruelty, or abandonment. Two decades later, all states have adopted some type of no-fault divorce and some form of the "equitable distribution" system of property division.[36]

Current "equitable distribution" statutes are still distinguishable as "dual-property" or "all property" classification systems.[37] Dual property jurisdictions classify the property as either marital or separate property, and then marital property is divided equitably between the spouses while separate property is divided according to legal title.[38] The all-property model divides assets owned by either spouse by considering factors such as spousal contribution to the marriage; property is divided at the court's discretion.[39] A majority of states adhere to the dual classification model.[40]

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33. *Id.*

34. *Id.*

35. *See* TURNER, *supra* note 14, at 12.

36. Thomas J. Oldham, *Putting Asunder in the 1990s: Divorce Reform at the Crossroads*, 80 CAL. L. REV. 1091, 1091-92 (1992) (reviewing DIVORCE REFORM AT THE CROSSROADS (Stephen D. Sugarman & Herma Hill Kay eds., 1990)). Actually, Oldham is incorrect; it wasn't until 2010 that New York became a no-fault divorce state. *See*, e.g., Sophia Hollander, *Divorces Drag On Even After Reform,* WALL ST. J., May 6, 2012, http://online.wsj.com/article/SB10001424052702304811304577368110112622548.html

37. *See* Kingma, *supra* note 14, at 78.

38. *Id.*

39. *Id.*

In summary, common law jurisdictions, through equitable distribution principles, recognize that upon the filing of a divorce, property division is a vested legal right that divides property equitably between the spouses.[41] Community property jurisdictions go a step further and treat community property as having a vested legal interest upon marriage, thus it is an immediate and real legal interest that will be equally distributed upon divorce or death.[42] Gone are the days when courts found it particularly equitable to award a wife with a one-third interest in the property, or when courts refused to value household duties or child raising. Today's statutes impose a presumption that both spouses contribute equally to the marriage and therefore are entitled to half the property upon a divorce.[43] While these models have arguably caught up with modern notions of equity when a marriage results in a divorce, the outcomes remains ambiguous and often times unfair when the marriage is dissolved because of death.

D. Variances Between Death and Divorce

When a spouse dies, the laws of property division are markedly different, especially among common law states.[44] Most notably, these states do not apply the same concept of marital property at death as they do at divorce.[45] Instead, the law of elective shares is applied, which allows a spouse to choose to elect a percentage of the estate (as prescribed by state law) instead of the amount provided under the will.[46] Unlike a divorce, ownership of marital property is not redefined to ensure equitable distribution; rather, title largely governs the determination of distribution.[47] Thus, in the event of death, the surviving spouse in a common law jurisdiction has the potential to be left with less than half of the marital

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40. *Id.* The dual classification model of equitable distribution exists in 27 common law states, the District of Columbia, the other seven traditional community property states, and the State of Wisconsin, which adopted the Uniform Marital Property Act, for a total of 36 jurisdictions. *Id.* The all-property model of equitable distribution exists in fifteen states, fourteen of which are common law states and one of which is a traditional community property state. *Id.*

41. *See id.*

42. *See id.*

43. *See id.*

44. *See* Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1246 (2005).

45. *See id.*

46. *See* Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487, 524 (2000).

47. *See* Rosenbury, *supra* note 44.

property, whereas she would have been granted more if she had divorced her husband before he passed away. A spouse in most states will receive more property if the "marriage ends by divorce than if the marriage lasts until 'death do us part;'" a uniquely counterintuitive result.[48]

In contrast, community property jurisdictions immediately vest a legal interest in the marital property so that the death of a spouse dissolves the marriage just the same as a divorce, thus, the outcome is usually the same in either situation.[49] Issues can arise in a community property state, however, when a party to a pending divorce dies before a final decree can be entered.[50]

Regardless of whether the jurisdiction is community property or common-law, if a party dies during a pending legal proceeding, the common-law doctrine of abatement prevails in a majority of states.[51] Abatement is the dismissal or discontinuance of a legal proceeding "for a reason unrelated to the merits of the claim."[52] Courts have long held that no power can dissolve a marriage that has already been dissolved by an act of God.[53] Thus, abatement divests the court's power to grant a divorce and the relief that comes with it, namely, property division and spousal support.[54] Instead, the laws governing death are imposed on the courts, which in common law states results in the application of the law of elective shares. Correspondingly, community property states apply their estate laws, which usually produce a similar outcome as that of the divorce laws.

Aside from the criminal law context, changes to the abatement doctrine have been mostly nonexistent.[55] Consequently, the progressive char-

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48. *Id.* at 1227.

49. *See* Kingma, *supra* note 14.

50. *See* Karpien v. Karpien, 2009-NMCA-043, 146 N.M. 188, 207 P.3d 1165.

51. Bologna, *supra* note 8.

52. Timothy A. Razel, *Dying to get Away with it: How the Abatement Doctrine Thwarts Justice–And What Should be Done Instead*, 75 FORDHAM L. REV. 2193, 2196 (2007) (quoting Black's Law Dictionary 1 (2d Pocket ed. 2001)).

53. Oldham v. Oldham, 2011-NMSC-007, ¶ 24, 247 P.3d 736, 742 (quoting Romine v. Romine, 100 N.M. 403, 404, 671 P.2d 651, 652 (1983); *see also* MacLeod v. Huff, 654 So. 2d 1250 (Fla. Dist. Ct. App. 1995); Segars v. Brooks, 284 S.E.2d 13 (Ga. Ct. App. 1981); Johnson v. Johnson, 653 N.E.2d 512 (Ind. Ct. App. 1995).

54. Brett R. Turner, *Equitable Distribution, Elective Shares, and Abatement of Divorce Actions*, 19 NO. 2 DIVORCE LITIG. 17 (2007).

55. *See* Razel, *supra* note 52. The rationale stemmed from the early common law's lop-sided interest in punishing the criminal defendant versus redressing the victim. *Id.* at 2197. If the defendant is not alive to be punished there was little reason to continue the proceedings. *Id.* But victims' rights amendments have since been enacted in most states that have effectively abolished the abatement doctrine in criminal proceedings. *Id.*

acteristics of equitable distribution are critically limited since divorce-relief can only be granted to living parties.[56] The doctrine of abatement functioned fine in the nineteenth century when property was not divided upon divorce outside of community property states.[57] Thus, potential relief from divorce was not affected by the abatement doctrine. However, in the current property systems where a value is placed on equitable property division upon divorce, abatement severely limits equitable relief, which has caused many scholars and judges to question existing laws.[58]

The fact that property division is unavoidably complex further muddies the issues.[59] Assets must be classified and valued before property division can be completed.[60] This often requires the time-intensive task of tracing assets back to their source.[61] But, because divorced parties are often anxious to get the divorce settled and move on with their future lives, parties often seek to expedite the process as much as possible.[62] Additionally, the public policy opposing abatement has given courts a reason to avoid the doctrine of abatement in order to give the surviving spouse a more equitable property division.[63] Consequently, the courts have modeled a number of exceptions to the common-law rule that death automatically causes a divorce action to abate.[64] One such exception, and the most commonly applied, is the bifurcation of the divorce proceedings.[65]

Bifurcation is a procedural device courts sometimes use to adjudicate two different issues that may arise from the same cause of action in

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56. *See* Turner, *supra* note 54.

57. *See id.*

58. *See, e.g.,* Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 598–604 (1995) (proposing that surviving spouse be given right to elect one-half share of assets of marriage); Newman, *supra* note 46, at 524–36 (proposing "value deferred-community-property elective-share system").

59. *See* Carol S. Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 HASTINGS L.J. 769, 775–76 (1982).

60. *See id.* at 779.

61. *See id.* at 781.

62. *See* Wilson v. Wilson, 732 N.E.2d 841 (Ind. Ct. App. 2000); Savage v. Savage, 1999 PA Super 197, 736 A.2d 633 (1999) (where parties desired bifurcation, and case was being diligently litigated, so that risk of harm from undue delay appeared small, proper to grant bifurcation).

63. *See* Edward B. Borris, *Abatement of Divorce and Ancillary Proceedings Upon the Death of a Party*, 9 NO. 2 DIVORCE LITIG. 25, 26 (West 1997).

64. *See id.* at 30 (noting that the exceptions have begun to "swallow the common-law rule.").

65. *See id.*

separate hearings.[66] In the divorce context, bifurcation usually involves splitting the actual dissolution of the marriage from the other legal formalities concomitant with divorce, namely property division.[67] Naturally, a long period of time passes between the entry of divorce and the conclusion of property division. Inevitably, situations arise when a party to the bifurcated proceedings dies between the final entry of the divorce decree and the entry of the property division order.[68] Without bifurcation, the death of a spouse before the final entry would traditionally abate the divorce proceedings.[69] With entry of the bifurcated divorce decree, however, the marriage was considered terminated before the death so that divorce law would still govern, and the surviving spouse would be more likely to receive a just portion of the marital property.

While bifurcation may seem to be a convenient and equitable solution in certain instances, it also creates several unforeseen complexities that courts have been reluctant to confront.[70] One such complexity is how to value marital property if it has increased in value between the time of the divorce and property division.[71] Others include: (1) the status of insurance coverage, (2) the tax liability of the parties, (3) the position of an ex-spouse when the other spouse dies between hearings and (4) the effect on a party when the other party files for bankruptcy between hearings.[72]

Impending death, though, has emerged as a proper situation in which to grant divorce bifurcation.[73] A spouse that requests bifurcation because her husband is terminally ill is in a sympathetic position, especially in common law states where there is the potential that she will be left with very little property and no spousal support upon the death of the husband.[74] For example, a spouse who owns little individual property may be a party to a pending divorce where the other spouse has a terminal illness.[75] With poverty and hardship imminently looming, the surviving spouse may request a bifurcated divorce so that upon the death of the

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66. *See* James Burd, Note, *Splitting the Marriage in More Ways Than One: Bifurcation of Divorce Proceedings*, 30 J. FAM. L. 903, 903 (1992).

67. *See id.*

68. *See In re* Marriage of Davies, 448 N.E.2d 882, 884 (1983).

69. *See* Borris, *supra* note 63,at 30–31.

70. *See* Burd, *supra* note 66, at 903–04.

71. *Id.*

72. *Id.*

73. *See* Fernandez v. Fernandez, 632 So. 2d 638 (Fla. Dist. Ct. App. 1994); Tunderman v. Lee, 585 So. 2d 354 (Fla. Dist. Ct. App. 1991); Fonzi v. Fonzi, 430 Pa. Super. 95, 633 A.2d 645 (1993).

74. *See Fernandez*, 632 So. 2d 638; *see also Tunderman*, 585 So.2d 354.

75. *See Fernandez*, 632 So. 2d 638.

other spouse, she will be left with a just portion of the marital property.[76] Judges are typically desirous to leave the surviving spouse in an equitable position. Thus, impending death has become a reasonable basis for entering an immediate decree of divorce, thereby preserving the right to equitable distribution.[77]

Aside from impending death, bifurcation has rarely been applied in divorce proceedings. Scholars have lately begun to question the paradoxical and unbalanced nature of the existing probate laws.[78] After all, why should the law leave the spouse in a better position in a divorce action than if she had finished the marriage "till death do us part?"[79] The law of elective shares has recently come under attack as unjust because it often leaves the surviving spouse with less than one half of the estate and the shares are taken from only that property titled in the deceased spouse's name that was subject to the probate process.[80] As a result, the estate tends to be classified much more narrowly under the laws of death than it does under the laws of divorce. Critics have worried that this approach closely resembles the early perceptions that dominated divorce and property division laws before equitable distribution arose.[81] While bifurcation is in many ways a device to curb the inequalities of the elective shares in the event of death, it is essentially an unintended reform method in response to criticisms.

Another, lesser-used exception is the ministerial act exception.[82] In special circumstances, a final divorce decree can be close enough to entry that it can be regarded as entered.[83] The ministerial act applies when a spouse dies after a divorce is entered but before it becomes final.[84] Still, not all courts have been as willing to circumvent common-law; a number of courts cling to tradition by refusing to order a decree absent a final

76. *See id.*

77. *See id.*

78. *See* Gary, *supra* note 58, at 604–05 (proposing that all property be presumed to be marital property and that marriage be treated as an economic partnership); Newman, *supra* note 46 (proposing the "value deferred-community-property elective-share system"); Turner, *supra* note 54.

79. *See* Rosenbury, *supra* note 44, at 1231.

80. *See id.* at 1246.

81. *See id.*

82. *See In re* Marriage of Wilburn, 18 S.W.3d 837, 840–41 (Tx. Ct. App. 2000).

83. *See* Brown v. Brown, 617 N.Y.S.2d 48, 48–49 (1994) (the entrance of the judgment was a mere "ministerial act" so that the divorce action did not abate upon the death of the husband).

84. *In re* Marriage of Wilburn, 18 S.W.3d at 841 (quoting Dunn v. Dunn, 439 S.W.2d 830, 832 (Tex. 1969)).

judgment being entered—no questions asked.[85] Similar to the clumsy, progressive steps that eventually spurred the equitable distribution revolution, exceptions to the abatement doctrine have slowly started to signal a reform of their own.

Overall, the abatement doctrine can be a useful demarcation tool that definitively precludes legal actions in the event of death, but its use in the divorce context is troublesome.[86] This trouble, however, does not directly stem from the doctrine itself, rather it flows from the counterintuitive laws of decedents' estates. It is with this in mind, I believe, that the New Mexico Legislature crafted its domestic affairs statute. The New Mexico courts were presented with a case that brought all of the eccentricities of divorce laws and estate laws to light. The case was even more challenging with the existence of the new domestic affairs statute that functions as a type of exception, similar to the bifurcation or ministerial exception that other courts have applied.

III. STATEMENT OF CASE

David and Glenda Oldham were married on August 27, 1983.[87] They had one child, a son, Dustin Oldham.[88] David worked as an FBI agent when, tragically, he was diagnosed, in 2003, with glioblastoma mul-

85. *See* Steele v. Steele, 757 S.W.2d 340 (Tenn. Ct. App. 1998) (upholding abatement doctrine when husband died before final decree even though the trial court wrote the husband a letter that he was entitled to a divorce, and the court had divided property and awarded attorneys' fees); Bayne v. Bass, 394 S.E.2d 726 (S.C. Ct. App. 1990) (holding that even though judge signed final decree only two days after the death of a party, the divorce action abates); *In re* Marriage of Wilson, 768 P.2d 835 (Kan. Ct. App. 1989) (death of party nine hours before signing of final decree grounds for abatement).

86. Other well settled exceptions to the abatement doctrine include appeal and wrongdoing. If a party dies after a divorce decree but prior to the date of an appeal the case does not abate. *See* Turner v. Ward, 910 S.W.2d 500 (Tex. Ct. App. 1994); *In re* Marriage of Butler, 795 P.2d 467, 469 (Mont. 1990) ("Where property interests are involved, an appeal in a divorce case does not abate upon the death of a party pending its determination."). Lastly, if a party has a hand in the other party's death, he will not be able to profit from that death. *See* Drumheller v. Marcello, 532 A.2d 807 (Penn. 1987) (estate was estopped from terminating equitable distribution of marital property upon legal theory that divorce action abated by death of spouse, where husband killed wife and subsequently took his own life); Howsden v. Rolenc, 360 N.W.2d 680 (Neb. 1985).

87. Oldham v. Oldham, 2009-NMCA-126, ¶ 3, 147 N.M. 329, 330, 222 P.3d 701, 702.

88. *Id.*

tiforme, an aggressive malignant brain tumor.[89] David bravely campaigned against the cancer, undergoing several surgeries and receiving treatment in both Albuquerque and at MD Anderson Cancer Center in Houston, Texas.[90] With mortality looming, David and Glenda jointly executed the David M. Oldham and Glenda Oldham Revocable Trust Agreement ("Trust") and the Last Will and Testament of David M. Oldham ("Will") on March 29, 2004, naming themselves as co-trustees.[91]

The Trust provided that either party had the unilateral power to revoke or terminate the Trust at will.[92] It also stated that upon the death of the first party, that party's share of the Trust property "shall be irrevocable."[93] The Will nominated Glenda as David's personal representative and permitted his entire estate (aside from his tangible personal property) to pass to the trust.[94]

On February 7, 2007, after twenty-three years of marriage and nearly three years after the creation of the instruments, David filed a petition for divorce.[95] During this time David also gave his son, Dustin, power of attorney so that Dustin could assist him in initiating the divorce proceedings against Glenda.[96] Soon after, Glenda filed a motion to dismiss David's petition for dissolution of marriage alleging that he was not competent to file for divorce and that he was coerced to do so by relatives.[97] But before this issue could be resolved, David died on May 7, 2007.[98]

Ten days later, Dustin filed an action in the probate court for informal appointment as personal representative of David's estate.[99] Glenda

89. *Id.*
90. Pet'r Bf. at 4.
91. *Oldham*, 2011-NMSC-007, ¶ 3.
92. *Id.*
93. *Id.*
94. *Id.* ¶ 4.
95. *Oldham*, 2009-NMCA-126, ¶ 3.
96. *Id.*
97. *Oldham*, 2011-NMSC-007, ¶ 5. During this time David was living with his sister in Phoenix, Arizona, he was also suffering from aphasia following his first brain surgery, which affected his language and cognition. The deposition testimony of David's treating physicians consistently provide that the aphasia became worse following the second brain surgery in 2006, and showed a progressive decline from that point until his death. *See* Appellee's Answer to Appellant's Brief in Chief, Oldham v. Oldham, 2011-NMSC-007, 247 P.3d 736 (No. 28,493).
98. *Oldham*, 2009-NMCA-126, ¶ 3 (this issue would have to be settled by the Family Court and could not be made without both adverse parties present to the action).
99. *Oldham*, 2011-NMSC-007, ¶ 6 (Dustin's exact age is undisclosed, but he was over the age eighteen during this time).

filed a counter-application for formal appointment to serve as David's personal representative.[100] Additionally, Glenda moved for partial summary judgment, seeking (1) appointment as personal representative of David's estate pursuant to David's Will and Trust, (2) affirmation that the Will and Trust were valid, and (3) admission of the Will to probate.[101] Dustin countered with his own motion for summary judgment, seeking nearly the opposite: that he be appointed representative and that the Will and Trust be declared invalid.[102]

A. District Court

The district court ruled completely in Glenda's favor and issued an order that appointed Glenda as personal representative of David's estate, validated the Trust and Will, and admitted the Will to probate.[103] The district court looked to New Mexico's Uniform Probate Code ("Probate Code"), which states, "a person nominated by a power conferred in a will" has priority for appointment as personal representative,[104] and New Mexico's newly enacted Section 40-4-20(B) of the Domestic Affairs code, which provides that:

> [I]f a party to the action dies during the pendency of the action, but prior to the entry of a [final] decree granting dissolution of marriage, separation, annulment or determination of paternity, the proceedings for the determination, division and distribution of marital property rights and debts . . . shall not abate. The court shall conclude the proceedings as if both parties had survived.[105]

With that, the district court held that Glenda was properly appointed as David's personal representative. Lastly, the district court concluded that a 40-4-20(B) entry does not amount to a final decree of divorce because it could not affect Glenda's right to the property laid out in the Will.[106] Therefore, as a matter of law, "[o]nly a final decree of divorce, and not the mere filing and service of a divorce petition, is sufficient to revoke a governing instrument, including the will and trust."[107]

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100. *Id.*
101. *Id.*
102. *Id.*
103. *Oldham*, 2009-NMCA-126, ¶ 4.
104. *Id.* ¶ 4 (quoting NMSA 1978, § 45-3-203(A)(1)).
105. NMSA 1978, § 40-4-20(B) (1993).
106. *Oldham*, 2009-NMCA-126, ¶ 11.
107. *Oldham*, 2011-NMSC-007, ¶ 6.

B. Court of Appeals

Dustin took his case to the New Mexico Court of Appeals, where he received a much more favorable outcome. The court of appeals first addressed the district court's appointment of Glenda as personal representative. The court of appeals held that the outcome of the pending divorce determines the status of the Will and the Trust, and thus it was not chronologically consistent to first appoint Glenda as personal representative at that early stage of the probate proceedings. The outcome of the pending proceedings would determine the validity of the estate planning instruments and only then will it be appropriate to consider whether Glenda is eligible for appointment as personal representative.[108] The court of appeals went on to reason that as personal representative, Glenda "would be obligated to represent David, who is the opposing party in their divorce proceedings," thus creating an inherent conflict of interest.[109] The court stated that Glenda "cannot adequately represent the adverse interest" of David "while contemporaneously protecting her own interest."[110] Therefore, the court of appeals ruled that the district court erred when it appointed Glenda as personal representative since the pending divorce proceedings must first conclude.[111]

Next, the court of appeals addressed the validity of the Will and the Trust. The court relied heavily on *Karpien v. Karpien*[112] for guidance on how to proceed under Section 40-4-20(B).[113] In *Karpien*, the wife died intestate while involved in divorce proceedings with her husband.[114] The husband in that case argued that the Probate Code prevailed over Section 40-4-20(B), which would abate the divorce proceedings so that the surviving spouse is not prevented from receiving an inheritance.[115] In other words, the husband argued that he was entitled to receive all of his wife's community property according to the Probate Code (the couple was childless) as if the divorce had never occurred.[116] In response, the court of appeals in *Karpien* established that in order to give effect to both Section 40-4-20(B) and the Probate Code,[117] the court must apply community

108. *Oldham*, 2009-NMCA-126, ¶ 7.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Karpien v. Karpien*, 2009-NMCA-043, 146 N.M. 188, 207 P.3d 1165.
113. *Oldham*, 2009-NMCA-126, ¶ 6.
114. *Karpien*, 2009-NMCA-043, ¶ 1.
115. *Id.* ¶¶ 8, 10–11.
116. *Id.* ¶ 4.
117. NMSA 1978, § 45-3-703(E) (1975).

property law "as if both parties had survived" when concluding a property division pursuant to Section 40-4-20(B).[118]

The court of appeals worked to harmonize the Probate Code and Section 40-4-20(B). The court started by stating that when "determining how to proceed when a party to a pending divorce dies testate, we must analyze NMSA 1978, Section 45-2-804 [of the Probate Code], which controls the effect of a divorce upon any previously executed governing instruments."[119] Also, Section 45-2-508 ("Section 508") of the Probate Code accepts that a change of circumstances set forth in Section 45-2-804 ("Section 804") is sufficient to revoke a will or any part of it.[120] Therefore, the question becomes whether a judgment pursuant to Section 40-4-20(B) meets the definition of a divorce set out in the Probate Code and, if so, is it sufficient to revoke David's Will or Trust?

The Probate Code defines a divorce or an annulment as "any dissolution or declaration of invalidity of a marriage that *would exclude the spouse as a surviving spouse [under] Section 45-2-802 [.]*"[121] Section 45-2-802 ("Section 802") directs that a surviving spouse does not include a party to a proceeding that purports to terminate marital property rights, "including a property division judgment entered pursuant to the provisions of Section 40-4-20[.]"[122] Thus, the court of appeals explained, a judgment issued pursuant to Section 40-4-20(B) excluded the surviving party from being defined as a surviving spouse under the Probate Code so that it fits the definition of a "divorce or annulment" pursuant to Section 804.[123] It follows, the court stated, that if Glenda is not a "surviving spouse," she is unable to receive distribution under David's governing instruments because the Section 40-4-20(B) entry terminated all her marital rights.[124] In conclusion, the court of appeals held that the filing for a divorce, even though a final decree was not entered, was adequate to revoke David's Will and Trust.

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118. *Karpien*, 2009-NMCA-043, ¶¶ 8–11.

119. Oldham v. Oldham, 2009-NMCA-126, ¶ 11, 147 N.M. 329, 323, 222 P.3d 701, 704.

120. *Id.*

121. NMSA 1978, § 45-2-804 (A)(2) (emphasis added).

122. NMSA 1978, § 45-2-802 (B)(3). Section 45-2-802 also specifies three other types of divorces or annulments: (1) a valid divorce or annulment (Subsection A); (2) an invalid divorce or annulment obtained by the survivor unless the parties remarried (Subsection B(1)); and (3) an invalid divorce or annulment obtained by the decedent only if the survivor remarried (Subsection B(2)).

123. *Oldham*, 2009-NMCA-126, ¶ 12; NMSA 1978, § 45-2-804(A)(2).

124. *Oldham*, 2009-NMCA-126, ¶ 12.

C. Supreme Court

The New Mexico Supreme Court accepted Glenda's petition for certiorari to formally address two issues: "(1) whether a final judgment distributing marital property pursuant to Section 40-4-20(B) revokes the governing estate planning instruments when the deceased party died during the pendency of the divorce proceedings, and (2) whether an inherent conflict of interest disqualifies Wife from serving as personal representative of Husband's estate."[125]

While the court acknowledged that Section 40-4-20(B) requires property division issues to be settled after the death of a party to a divorce action, it ultimately found that it cannot statutorily revoke governing instruments.[126] Instead, the court held that wills and trusts can only be revoked through strict compliance with the statutory formalities established by New Mexico law, namely the Uniform Probate Code and the Uniform Trust Code ("Trust Code"), which is meant "to discover and make effective the intent of a decedent in distribution of his property."[127] Strict adherence to the revocation statutes was designed to protect decedents who are unavailable to defend their estate plans against fraud.[128]

Under the Probate Code, possible acts of revocation include executing a subsequent will or performing a revocatory act on the will, such as "burning, tearing, canceling, obliterating or destroying the will or any part of it."[129] Because David neither executed a subsequent will nor performed one of the listed acts to his existing Will, it remained enforceable. In addressing the revocation of the Trust under the Trust Code, the court looked primarily at the terms discussing revocation provided in the Trust itself.[130] The terms of the Oldham Trust simply provided that either part may revoke by signing a "duly executed instrument."[131] Aside from the express terms of a trust, creating a new trust that specifically devises property that would otherwise have passed according to the terms of the trust, or "any other method manifesting clear and convincing evidence of the settlor's intent" can work to revoke a trust.[132] By failing to execute

125. Oldham v. Oldham, 2011-NMSC-007, ¶ 9, 149 N.M. 215, 218, 247 P.3d 736, 739.

126. *Id.* ¶¶ 12–14.

127. *Id.* ¶¶ 14–15 (quoting NMSA 1978, § 45-1-102(B)(2)).

128. *Id.* ¶ 16 (such as alleged oral declarations that the deceased wished for a revocation of his will and instead for scoundrel X to receive all of his property).

129. *Id.* ¶ 17 (quoting NMSA 1978, § 45-2-507(A)(2)).

130. *Id.* ¶ 18.

131. *Id.*

132. *Id.* (the court also noted that if the trust does not expressly establish a revocation method, a later will or codicil that specifically devises property that would other-

such an instrument or create a conflicting trust, David did not revoke his Trust according to the Trust Code's language.[133] The court refused to consider whether filing for a divorce constituted "clear and convincing evidence" that David wished to revoke the Trust because Dustin failed to argue this point to the district court so that it was not successfully preserved.[134]

Next, the supreme court examined the effect a Section 40-4-20(B) entry has on the Probate and Trust Code's requirements.[135] Dustin argued that a Section 40-4-20(B) entry revoked David's governing instruments because Section 804 of the Probate Code says that a divorce revokes revocable governing instruments. The court rejected that argument by stating that Section 804 is not applicable in this case because it can only revoke *revocable* instruments, and the Will and Trust "both became *irrevocable* when [David] died."[136] Therefore, the Will or Trust cannot be revoked by the "divorce or annulment" provision of Section 804.

The court then expressed concern that the court of appeals' decision improperly gives the domestic affairs court jurisdiction to grant a posthumous divorce.[137] Most jurisdictions have traditionally found that a pending divorce action becomes moot when one party to the action dies; "[N]o power can dissolve a marriage which has already been dissolved by act of God."[138] The legislature expressly provided three specific tasks a court may complete if a party dies to a divorce during its pendency under Section 40-4-20(B); (1) division of marital property rights and debts, (2) dis-

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wise have passed according to the terms of the trust will work as a revocation method). *Id.*

133. *Id.*

134. *Id.* ¶ 20. The court's refusal to address this issue appears to do more with the technicality of preservation, as it stated that it "is doubtful that the mere filing and service of a divorce petition could" fulfill the requirement because less formal methods "provide less reliable indicia of intent" than the other methods mentioned. Interestingly though, in Dustin's counter-motion for summary judgment, he argued that David's petition for dissolution of marriage should be considered a "duly executed instrument" because the language of the trust does not prescribe a specific form to be submitted. Also interestingly, in *State v. Garcia*, Justice Bosson argues that the court should "reject any 'super preservation requirement' or highly technical construction that would, in effect, hold our state Constitution hostage to the vagaries of trial counsel competency." 2009-NMSC-046, ¶57, 147 N.M. 134, 148, 217 P.3d 1032, 1047 (dissent).

135. *See* NMSA 1978, § 40-4-20(B).

136. Oldham v. Oldham, 2011-NMSC-007, ¶ 21, 149 N.M. 215, 221, 247 P.3d 736, 741 (emphasis added).

137. *See id.* ¶ 24.

138. *Id.* (quoting Romine v. Romine, 100 N.M. 403, 404, 671 P.2d 651, 652 (1983)).

tribution of child support, and (3) determination of paternity.[139] Nothing in Section 40-4-20(B) gives the court power to grant a posthumous divorce decree.[140]

Next, the supreme court rejected Dustin's argument, and the court of appeals' ruling, that a Section 40-4-20(B) entry meets the definition of a "divorce or annulment" under Section 804 of the Probate Code. Section 804 states that a divorce is any dissolution of marriage that would exclude the spouse as a surviving spouse defined under Section 802.[141] Section 802 expressly says that a party to a property division entered under Section 40-4-20(B) is excluded as a surviving spouse.[142] But, Section 802 is a definitional statute that applies only for the "purposes of Chapter 45, Article 2, Parts 1 through 4."[143] Specifically, it does not apply to Section 804, which is found in Part 8 of Chapter 45, so that Dustin's desired exclusion of Glenda as a surviving spouse was held to be misapplied.[144] In response to Dustin's reliance on *Karpien* to support his claim, the court stated that Karpien was distinguishable because the spouse in *Karpien* died intestate.[145] That one fact, said the court, altered the interpretation and application of the Probate Code. The husband in that case was correctly held not to be a "surviving spouse" in an intestate action under Section 802, which expressly applies to the section of the Probate Code that governs intestacy.[146] The supreme court stated that the difference of "how the controlling effect of Section 40-4-20(B) gives different results depending on whether a party to a pending divorce action dies with or without governing instruments."[147] The court concluded this matter by stating that it cannot perceive that the legislature intended for a Section 40-4-20(B) entry to posthumously revoke governing instruments.[148]

Then, the court denied Glenda's argument that the court should distribute David's estate under the estate plan and the Probate Code prior to concluding the proceedings for the division of marital property.[149] In effect, Glenda wished to fulfill the Will's and the Trust's functions before establishing the proper shares of marital property and debts.[150] The court

139. *Id.* ¶ 25.
140. *Id.*
141. *Id.* ¶ 27.
142. *Id.* ¶ 28.
143. *Id.*
144. *Id.*
145. *Id.* ¶ 29.
146. *Id.* (quoting NMSA 1978, § 45-2-802(B)(3)).
147. *Id.*
148. *Id.* ¶ 30
149. *Id.* ¶¶ 31–35.
150. *See id.* ¶ 34.

found this method "unworkable and contrary to legislative intent."[151] It was first necessary to determine the property over which the Will and Trust had control before carrying out the instruments' purposes, same as in the court of appeals.[152]

At that point, the court attempted to give Section 40-4-20 a definitive purpose. Dustin contended that David owned additional property at the time of his death that was not covered by the Will or the Trust.[153] The court felt that the function of Section 40-4-20 is to allow the court to first determine the property that the governing instruments have control over before enforcing their terms.[154] Or as the court put it, "[i]f a party to a pending divorce dies with a valid will, the domestic affairs proceeding must first determine the property over which the decedent can exercise the power of testamentary disposition."[155] The court reasoned that this was the legislature's intent.[156]

Finally, the supreme court refused to appoint Glenda as personal representative of David's estate because she is disqualified for having directly adverse interests as to David's estate.[157] The court pointed out that the statute governing the selection of personal representatives for a deceased's estate only applies to "persons who are not disqualified." Due to the inherent conflict of interest that was present, Glena was "disqualified."[158] The supreme court reversed the court of appeals holding that an entry under Section 40-4-20(B) statutorily revoked governing instruments. Conversely, the court affirmed the chronological order of proceedings the court must undertake in similar circumstances as those in *Oldham*, and affirmed the disqualification of Glenda as personal representative of David's estate.[159]

IV. ANALYSIS

While the supreme court remained completely faithful to New Mexico's statutory language, it reached an outcome that is contrary to the public policy behind Section 40-4-20(B) (hereinafter, "Survivor Statute"). The court upheld the validity of a will and trust that was created during

151. *Id.* ¶ 31.
152. *Id.* ¶ 34.
153. *Id.* ¶ 38.
154. *Id.*
155. *Id.* ¶ 34.
156. *Id.* ¶ 38.
157. *Id.* ¶¶ 36–38.
158. *Id.* ¶ 37 (quoting NMSA 1978, § 45-3-203).
159. *Id.* ¶ 29.

the happy matrimonial state despite the fact that David clearly intended to divorce Glenda and that a final decree would have statutorily revoked the Will and the Trust.[160] Instead, the court, working to harmonize New Mexico's statutes, plucked and chose when to apply divorce law and when to apply the doctrine of abatement. The results allowed Glenda to benefit from her deceased husband's will, while David's heirs, including his only son, Dustin, were left with no remedy. Oldham's ruling has important ramifications for divorce and estate planning attorneys in New Mexico.

New Mexico's Domestic Affairs code retains the primary principles of the common law doctrine of abatement, but allows for a few specific exceptions when a party to a pending divorce dies. The Survivor Statute prohibits the courts from abating the dissolution of marriage itself, but authorizes incidental claims, such as property rights, to survive death. As previously discussed, there is an emerging movement that seeks to depart from the doctrine of abatement in divorce proceedings.[161] This is due in large part to the counterintuitive fact that a divorced spouse in a common law state is often left in a better position than that of a surviving spouse.[162]

Today, both common-law and community property states generally have the similar effect of leaving the divorced party with roughly one-half of the marital property.[163] Likewise, when a spouse dies intestate, both jurisdictions tend to split the deceased's property up between surviving issue and the surviving spouse.[164] The potential inequity lies in the fact that estate laws in common-law jurisdictions do not redefine separately held property as marital property upon marriage. Therefore, the deceased's governing instruments, such as a will, can govern property division at death. This, too, is usually not a problem, but situations arise where a bitter spouse undergoing the aches of a pending divorce may alter his will to exclude the soon-to-be ex-wife from receiving any of his property, thereby leaving the surviving spouse with an unjust portion of property. Again, this outcome is possible because title to marital property in common law states does not vest until the divorce is final, so that a spouse who holds title to a majority of property can lawfully devise it to individuals other than the spouse.[165]

Granted, an ex-spouse can elect against the will. But the option to elect against the will has three serious flaws. First, it is timely and costly.

160. *See* NMSA 1978, §§ 45-2-508, 45-2-804(B)(1)(a); *Oldham*, 2011-NMSC-007.
161. *Supra* note 78.
162. *See* Rosenbury, *supra* note 44, at 1231.
163. *Id.* at 1231.
164. *See* NMSA 1978, § 45-2-102 (2011).
165. Rosenbury, *supra* note 44.

This places the ex-spouse in a particularly risky position, should she assume the costs or simply accept the will's bequests. Second, elective share law usually awards much less than one-half of the deceased's estate.[166] Lastly, the elected share is limited to property subject to the probate process. Essentially, much of the property accumulated from wages during the marriage could escape classification as marital property if the spouse who held the title to the property utilized many of the available non-probate transfer methods, i.e., payable on death accounts, inter vivos trusts, etc.

But New Mexico is not a common law state. A divorcing party cannot lawfully devise marital property beyond his or her one-half interest because title vests in both parties upon marriage.[167] The results of property division upon death and divorce are, in large part, identical. Common law states have a public policy interest in continuing divorce proceedings after the death of a spouse so that the surviving spouse is not left with less than a fair share of the property. So what was New Mexico's rationale for drafting a statute that partially abolishes abatement and allows for the conclusion of property division in the event of a death during a pending divorce?

The answer lies within the nooks and crannies of community property, where there are a few instances where the laws of divorce net far more equitable outcomes than the laws of estate.[168] This might happen when a party to a pending divorce dies intestate and without living issue.[169] In this case, the surviving spouse, who the deceased may no longer wish to receive a portion of his or her property, may in fact receive all of his or her marital *and* separate property.[170] The surviving spouse therefore has the potential to gain his one-half interest from the divorce action plus the deceased's one-half interest, including his or her separate property. This occurs even if the deceased has other close relatives who may have an adverse claim to the surviving spouse because New Mexico and most other states that have adopted the Probate Code, which grants the entire intestate estate to the surviving spouse if the decedent does not

166. *Id.* The laws historically gave spouses the right to only a third of the deceased spouse's probate property. CAROLE SHAMMAS ET AL., INHERITANCE IN AMERICA FROM COLONIAL TIME TO THE PRESENT 85–86 (1987). In addition, up until the twentieth century, this one-third share was in the form of a life estate rather than in fee simple. *Id.*

167. Kingma, *supra* note 14.

168. *See* Karpien v. Karpien, 2009-NMCA-043, 146 N.M. 188, 207 P.3d 1165.

169. *See id.*

170. *See id.*

have any living children.[171] The other instance arises when a spouse created a will or a trust during the marriage but failed to alter or revoke the instruments during the pendency of the divorce and dies before he or she can do so, which are essentially the facts in *Oldham*.

New Mexico and other community property law states are in the unique position that their estate laws may actually leave a surviving spouse in a much better position than a divorced spouse. This can be a problem when the parties filed for divorce—usually seen as a mutual gesture that the couple no longer wish to share their lives as one—but one spouse dies before the ministerial act of entering the final decree. In that instance, a surviving spouse may gain all of the deceased's property, even though the deceased might not have wished for this to happen, and while the deceased may be dead, his surviving relatives certainly have a valid interest in his marital and separate property. Indeed, this is why New Mexico and many other jurisdictions have created a statutory assumption that divorce works as a revocation of a designation in favor of an ex-spouse.[172] That assumption is embodied in the Probate Code and is consistent with human experience. Those with expertise in the matter have concluded that it "more often" serves the cause of "[j]ustice."[173]

On the one hand, in common-law states a spouse may devise property that is titled in his name but was gained during the marriage, or devise of it through non-probate procedures during a contentious divorce and die before the decree is entered. The later may result in a severely inequitable property distribution for the surviving spouse if the action is abated. On the other hand, New Mexico's community property laws can unjustly enrich a surviving spouse if a divorcing party dies intestate and childless, or if a spouse forgets to revoke or alter his will during a pending divorce and passes away prior to the final entry. I believe that these are the only possible outcomes that the legislature could have been contemplating when drafting the property division allowance of the Survival Statute. The legislature wanted to ensure that surviving spouses in a divorce action were not awarded with a windfall of property and that a deceased's family was not precluded from gaining their dead relative's property. This is especially true if that relative is a child from a previous marriage or if the child is an adult as he was in *Oldham*.

So, given all that, it would seem that *Oldham* was ready to be analyzed under New Mexico's unique Survivor Statute so that its public policy could be properly displayed. The court was poised to demonstrate the

171. *See* NMSA 1978, § 45-2-102 (2011).

172. *See* NMSA 1978, § 45-2-804(B) (2011).

173. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1135 (1984).

Survivor Statute's rich history and progressive subtleties that replaced antiquated views with the modern endeavor to net equitable outcomes. Yet, the court was hamstrung by New Mexico's conflicting statutes governing the revocation of wills and trusts by a divorce action in the Probate Code in conjunction with the Survivor Statute.

The New Mexico Supreme Court began its discussion by admitting that the Survivor Statute departs from the common-law rule of abatement and that it "applies in this case and requires the domestic affairs court to finish dividing Husband's and Wife's marital property rights and debts."[174] Despite that, the court ruled that David's Will and Trust could not be revoked by the Statute because the plain language of the Probate Code, the Trust Code, precedent, and most importantly, for this note's purpose, "the strict statutory formalities required" to revoke the governing instruments.[175]

The court asserted that the Probate Code is the exclusive means by which a will can be revoked.[176] Section 45-2-507 ("Revocation Statute") of the Probate Code explains that a testator can revoke a will only by executing a subsequent will or "performing a revocatory act on the will" such as "burning, tearing, canceling, obliterating or destroying the will or any part of it."[177] The court concluded that since David did not alter or execute a subsequent will or perform one of the stated acts, his Will was not revoked.[178] The court next pointed out that the Trust Code provides that a settlor can revoke a trust by the method of revocation set out in the terms of the trust, or, if no terms are spelled out, the settlor can create a conflicting trust or manifest any other evidence that he intends the trust to be revoked.[179] Once again, the court concluded that David did not fulfill any of these formalities, though it is hard to say what act manifests a clearer intent to revoke the instruments than filing for a divorce.

The court's reading is conveniently narrow because it fails to mention other pivotal sections in both codes. First, Section 508 of the Probate Code ("Revocation of Wills by a Change in Circumstance Statute"), which covers the revocation of wills by a change in circumstances and immediately follows the quoted material from the court's opinion, says that, "[e]xcept as provided in . . . 45-2-804 NMSA 1978, a change of cir-

174. Oldham v. Oldham, 2011-NMSC-007, ¶ 14, 149 N.M. 215, 219, 247 P.3d 736, 740.

175. *Id.*

176. *Id.* ¶ 17.

177. NMSA 1978, § 45-2-507 (2011).

178. *Oldham*, 2011-NMSC-007, ¶ 17.

179. *Id.* ¶ 18 (quoting NMSA 1978, § 46(A)-6-602).

cumstances does not revoke a will or any part of it."[180] The Trust Code essentially states the same thing: "[t]he capacity required to create, amend, revoke or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will."[181] Therefore, the Probate Code also allows for the revocation of governing instruments under Section 804 ("Revocation by Divorce Statute").

Next, the court determined that Dustin relied "on Section 45–2–804 of the UPC, which provides for '[r]evocation of probate and nonprobate transfers by divorce.'" While this is half true, the court failed to mention that the Revocation of Wills by a Change in Circumstance Statute, which was omitted in the opinion, was actually first to rely on this section of the Probate Code, not Dustin. The court dismissed this fact by necessity, however, because to do otherwise would fail to give meaning to an express applicability standard set out in Section 802 ("Effect of Divorce Statute"). In so doing, though, the court upset the public policy underlying the Survivor Statute.

The root of the problem lies in the applicability standard set out in the Effect of Divorce Statute. On the one hand, the Revocation by Divorce Statute spells out that a divorce is any proceeding that "would exclude the spouse as a surviving spouse within the meaning of Section 45-2-802 (the Effect of Divorce Statute)," which is a definitional statute.[182] Yet on the other hand, as the court pointed out, the Effect of Divorce Statute only applies to "Chapter 45, Article 2, Parts 1 through 4[,]" not the Revocation by Divorce Statute, which is in Part 8 of the Probate Code.[183] The Effect of Divorce Statute further states that a surviving spouse does not include "an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights, including a property division judgment entered pursuant to the provisions of Section 40-4-20 (the Survivor Statute)."[184] Inevitably, the question that arises is, why then, does the Revocation by Divorce Statute refer to the Effect of Divorce Statute if that statute does not apply to it? Put another way, why does the statute that defines divorce for revocation of governing instruments rely on the definition of divorce from a statute that expressly excludes it from its application?

It is indisputable that Glenda was a party to a valid divorce proceeding entered under the Survivor Statute. The problem is that the court

180. NMSA 1978, 45-2-508 (2011).
181. NMSA 1978, § 46(A)-6-601 (2011).
182. NMSA 1978, § 45-2-804(A)(2) (2011).
183. NMSA 1978, § 45-2-802(B) (2011).
184. *Id.*

cannot technically rule that Glenda and David were divorced under the terms of the Revocation by Divorce Statute because Glenda cannot be excluded as a "surviving spouse" under the Effect of Divorce Statute. The court grappled with the thought of granting a posthumous divorce by saying that it is not authorized to do so under the Survivor Statute, which only allows for property division, spousal support and paternity determination.[185]

But granting a posthumous divorce is not necessary to revoke the governing instruments and to fulfill the purposes of the Survivor Statute. The court simply needs to "conclude the proceedings as if both parties had survived."[186] If the divorce proceedings had concluded, the governing instruments would have been revoked under the Revocation by Divorce Statute, which is permitted according to Section 508—the Revocation of Wills by a Change in Circumstance Statute.[187] The court is, in fact, able to conclude the proceedings and not grant a posthumous divorce at the same time. By revoking the instruments, the court is simply finishing up the procedural details of a divorce, not officially granting it.

By not allowing the court to revoke governing instruments when a party to a pending divorce dies, the Survivor Statute has no purpose because the outcomes upon death or divorce are the same in New Mexico. The court sought to give purpose to the Survivor Statute by saying that it allows the domestic court to determine what property is subject to the terms of the will and trust before enforcing those instruments. But this is simply not enough; the extent to which the instruments controlled would have to be determined regardless of whether the laws of divorce or estate applied.

By expressly excluding the Revocation by Divorce Statute from the change of circumstances that do not revoke a governing instrument, New Mexico's Legislature intended that a divorce that excludes the surviving spouse under the Effect of a Divorce Statute unquestionably revokes governing instruments. Further, by drafting the Survivor Statute in 1993, the legislature intended to prevent the potential windfall that a surviving/divorced spouse might receive. This can be deduced because there are no distinguishable differences between the outcomes of property division upon death or divorce in New Mexico and other community property states. To be clear, the former statement only refers to the property division aspect of the Survivor Statute. The paternity determination and

185. NMSA 1978, § 40-4-20(B).
186. *Id.*
187. NMSA 1978, § 45-2-508 (2011).

spousal support are equally important purposes but they are not pertinent to this case.

So what can be done? By the simple act of excluding Glenda as a "surviving spouse," the purpose behind the Survivor Statute could be realized. But for this act to occur, the definition of "surviving spouse" must be applicable to the part of the Probate Code that covers the revocation of governing instruments by a divorce or annulment. This could be done by penciling in "and Section 45-2-804 (the Revocation by Divorce Statute)" under the applicability standards of Section 802 (the Effect of Divorce Statute) that defines "surviving spouse."

There is one last caveat that deserves mention. If the Trust was an "AB trust," also called a credit shelter or bypass trust, David's property might have eventually passed on to Dustin upon Glenda's death. With an AB trust, instead of leaving their property to each other, both spouses leave their property to an irrevocable trust.[188] The survivor receives any income from trust property and under some circumstances has access to the principal.[189] Typically, the couple's children inherit the property after the second spouse dies.[190] The hitch is whether the terms of the Trust allowed Glenda unlimited access to the principle of the Trust or not. If so, she could have withdrawn or disposed all of the property from the Trust so that Dustin could be left with nothing at her death. If her access was limited, however, some amount of the principle would most likely be left for Dustin at Glenda's death.[191] But because Dustin and his family litigated all the way to the New Mexico Supreme Court, they must have had reason to believe that Glenda might have the ability to invade the Trust. Also, an AB trust is a fairly sophisticated estate-planning tool that not all couples have access to, but it could nonetheless have been a mitigating factor in the court's final decision.

In the interim, however, attorneys who face these circumstances must be aware of the potential outcomes and plan accordingly. With the court's ruling in *Oldham*, lawyers and divorcing individuals cannot count on filing for a divorce to revoke governing instruments absent an entry of a final decree. With that in mind, certain precautions and procedures are now necessary considerations when an individual wishes to get a divorce. An attorney would be wise to advise a divorcing party to alter or revoke their governing instruments at the same time as they file for a divorce. And while not all divorcing parties may be waging a battle with a termi-

188. David E. Libman, Esq., *How to Fund and Administer Post-Death Subtrusts in A Declining Economy*, 12 CHAP. L. REV. 301, 303 (2008).

189. *Id.*

190. *Id.*

191. *Id.*

nal illness or facing imminent death, there is always the possibility that a person may meet some unfortunate casualty.

In light of *Oldham,* an attorney could possibly face malpractice accusations if he fails to advise his client of these developments in the law because the client's interests and wishes could be severely thwarted if the divorcing party wished to devise his property to individuals other than his soon to be ex-spouse. This wish, of course, is not inconceivable; surely, it is a rare instance that a divorcing party wishes to leave her ex-husband with all of her separate and marital property. Instead, a divorcing party would probably prefer the opportunity to devise her property to individuals who are natural objects of her affection. In sum, when an individual enters your office seeking a divorce, make it a habit to inquire about the status of that person's governing instruments and make sure that his desires are not frustrated in the unfortunate event of his or her death.

In the end, *Oldham* presented a set of facts that challenged the historical notions of equity. The New Mexico Supreme Court was forced to circumvent the purposes behind New Mexico's relatively new Survivor Statue because the conflicting language of the Probate Code. In so doing, the court adhered to the common-law doctrine of abatement and upheld the validity of David's governing instruments even though he had filed for divorce from his wife. In order to correct the legislature's intent, the legislature must revise applicability standards of the Effect of Divorce Statute of New Mexico's Probate Code. In the meantime, though, it is important, possibly even necessary, that practicing attorneys adapt to the court's ruling by altering or revoking a divorcing party's governing instruments to suit their intentions at the same time as they file for a divorce.