Historically, courts of law, presided over by judges, and courts of equity, presided over by chancellors, were separate in function and procedure. Law courts were governed by strict rules and rights while chancellors, the representatives of the king, were said to rule with discretion, utilizing concepts of fairness, morality and conscience.

In modern times, courts of law and equity have been merged and concepts of equity have receded as a myriad of statutes and regulations have replaced the application of “conscience” in the administration of justice. Early probate courts in America exercised equity jurisdiction. Probate judges continue to be conscious of the equitable legacy of the courts over which they preside. The Colorado Probate Code, adopted in Colorado in the 1970s, reminds judges sitting in probate that “Unless displaced by the particular provisions of this code, the principles of law and equity supplement its provisions.” C.R.S. §15-10-103.

Recently, the Colorado Supreme Court reaffirmed that the “probate court’s traditional powers in equity supplement and reinforce the statutory directives of the Colorado Probate Code.” Beren v. Beren, 349 P.3d 233 (Colo. 2015). While the Supreme Court faulted the method used to calculate an equitable adjustment to a surviving spouse’s elective share, the Supreme Court approved the equitable award if calculated using alternative methods, including several suggested by the Court itself.

Undoubtedly there will continue to be resistance to the application of equity in probate proceedings—particularly from counsel or parties who are at risk of suffering detriment resulting from its application. It’s hard to imagine such efforts will be any more successful in light of the current status of Colorado law.

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