Estate Administration Manual

What you need to know when someone dies.

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by

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To our clients: past, present, and future.
Without you we would not be the
success we are!

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Disclaimer

Although this book is written by lawyers, you should not read it and then rely on it for legal advice. This book is not intended to be legal advice or create any type of attorney-client relationship. It is only a general discussion of legal issues by the authors.

If you have questions about any of the items discussed in this book, please go see an attorney well-versed in these issues. Laws and regulations surrounding these issues are constantly changing, so you should consult with an attorney who is current on the law in this area.

We are Colorado lawyers licensed to practice law in the State of Colorado. This book discusses the law and our experience with estate and trust administration from the viewpoint of Colorado law. Many of the principles discussed in this book may apply to the law and practices in other states to some degree, but please keep in mind that laws do vary from state to state.

Introduction

WHAT IS THIS BOOK ALL ABOUT?

Losing a loved one is hard. We never really are quite ready for it, nor are we as prepared as we tell ourselves we are. Therefore, it is not surprising that it can be overwhelming and intimidating to find yourself in the role of administering an estate of a decedent. You may be the named personal representative in a will, or the successor trustee to a trust created by a decedent. You might also be an heir or beneficiary of an estate asset.

It is hard to know where to start with so much happening all at once. The information here is meant to help explain the nature of the different rules and duties the person administering the estate must follow. We use the term "estate" in a general sense to include all the decedent's assets. These assets may be subject to the court probate process (governed by Colorado's statutory Probate Code), while other assets may be subject to the terms of a trust. A decedent might also have other assets that pass automatically to an heir pursuant to a beneficiary designation or some form of joint ownership.

It is our hope we can help demystify the complex process and give you a start in understanding the issues faced by the fiduciary administering the estate. We will at times refer to the individual administering the estate as a fiduciary. A "fiduciary" is a person who holds a special relationship over the assets in a probate proceeding or trust

administration. A fiduciary might also have to look into other types of assets that pass by reason of the decedent's death to a third party, such as retirement accounts, life insurance policies, joint tenancy assets, or pay on death accounts.

✦ **Really Important Point:** In this book, we will often refer to "you," the reader. At other times, we refer to the personal representative or trustee. It may seem we are using the terms interchangeably. We are not trying to confuse you. This book is intended to be read by someone wanting to understand the estate administration process (such as an heir) and also by someone expecting to become a personal representative or trustee. You, the reader, may or may not become the personal representative or trustee. Now you know why the words seem to be used interchangeably.

We'll provide definitions of terms you will commonly come across and address commonly asked questions. We'll also shed some light on a few common misconceptions about the estate administration process.

This book is not a replacement for seeking assistance from a trained professional to help guide you through the process. Often professional accounting, legal, and financial planning advice is needed and should not be avoided. "Doing it yourself" can sometimes work, but it can also cause mistakes to be made, some of which could be quite expensive and regrettable in other ways. Your need for professional guidance depends upon your personal experience and the complexity of the estate in which you are involved. Proceeding cautiously is the best advice.

Don't be afraid to seek competent professional assistance from someone who has extensive experience in administering estates.

Before we get into the details, it is important to understand fiduciaries will be required to look at the decedent's estate from many perspectives. The questions you must ask yourself will include:

- Were there any burial instructions left by the decedent?
- Is the decedent married or single?
- If the decedent is married, is this the first marriage?
- If the decedent has children, are the children of the first marriage or later marriages?
- Did the decedent die with a valid will?
- Did the decedent create a trust or have an interest as a beneficiary of a trust?
- Did the decedent own real property outside the state of Colorado?
- Did the decedent own assets that pass by the right of survivorship or are otherwise not controlled by the terms of a will, such as assets owned in joint tenancy, a retirement account, life insurance, payable on death accounts, or one or more beneficiary deeds?
- What is the value of the decedent's estate, and is the estate subject to estate tax?

The above are just some of the questions that must be answered to understand how the estate should be administered.

Meet a few of the cast of characters:

From time to time, we will introduce you to characters we have had the opportunity to meet over the decades we have (collectively) counseled regarding estate administration matters. The reader will have an opportunity to meet Mr. Sanders, a lawyer appointed the personal representative of the estate of a large landholder in southwest Colorado. Mr. Sanders was appointed as an independent personal representative instead of the decedent's children. As they say: No good deed goes unpunished.

Then there is Mr. Travis, who was an artist who lived on credit cards. The family of Mr. Travis delayed commencing a probate for more than a year to avoid Mr. Travis's creditors from filing claims in his estate, which would have forced the liquidation of his art collection.

Of course, this book would not be complete without mentioning Mr. Jackson. He was a hermit and left a household mess for his personal representative to clean up. There were floors not cleaned for years. Dirty dishes were piled high in the sink, and old newspapers and papers covered almost every flat surface. Dirt and grime were everywhere. It was nothing short of disgusting.

We have told only a fraction of the stories we have experienced. There are so many "war stories" we could tell, illustrating some of the difficulties in administering an

estate. We hope you enjoy the characters and stories scattered throughout the book to help illustrate the point we want to make.

✦ **Really Important Point:** You will see numerous references to the Colorado Revised Statutes ("C.R.S.") throughout this book. If you wish to learn more about the subject, you can search in your internet browser the particular citation and go directly to the source. The statutes can be complicated and at times may appear to make no sense. Statutes, however, must be read in the context of the entire probate code. Nonetheless we include statutory citations because we want to give you more rather than less information.

CHAPTER 1

WHERE DO I START?

1.1 THE VERY FIRST STEPS

Burial Instructions: Let's start with the obvious. Within the first days of the decedent's death, it is important to determine what, if any, burial instructions the decedent may have been left. Under Colorado law, a decedent may set forth burial instructions in a written document, and most often these instructions are written in a will. This would be the first place to look.

The Colorado Disposition of Last Remains Act (C.R.S. Section 15-19-101 through Section 15-19-109) sets out various rules regarding an individual's ability to direct how their final remains are to be treated. An individual can complete and sign a "Declaration of Disposition of Last Remains," which can be kept with his or her other estate planning documents. This Declaration can give instructions regarding an individual's choices about burial, cremation, ceremonial arrangements, and other related post-death matters.

Individuals can also complete a document directing their wishes regarding making an anatomical gift, for example, organ transplantation or donating one's body for

scientific research. Directions on how to do this can be found in the Colorado statutes mentioned above.

We have seen on more than a few occasions disputes over who gets to direct the funeral arrangements for a decedent. This is not uncommon to see when the decedent has a surviving second spouse and children from a prior marriage. We have also seen the situation where the decedent's remains were disposed of in a manner contrary to the decedent's wishes. This can happen when the decedent's pertinent estate planning documents are not timely discovered. A personal representative therefore should act promptly to determine what documents may exist concerning the decedent's wishes about disposition of their final remains.

The personal representative should also consider the issue of an autopsy. Discovering exactly how a decedent may have died can be important to heirs for a variety of reasons. Give this some thought and visit with the decedent's physician to get some advice before the body is disposed of in accordance with the decedent's wishes.

What happens if the heirs cannot agree? It is possible to have a court determine how a decedent's last remains are to be disposed of. The mortuary may have to hold a body until the heirs have a consensus, a court issues an order, or the personal representative (appointed by a court) makes the final decision.

Pursuant to Colorado law in C.R.S. § 15-19-106, an individual can appoint someone in a "Declaration of Last Remains" to make the decisions regarding the disposition of their remains and ceremonial arrangements. This person would have priority to make decisions should there be a

conflict among the survivors over these issues. If no person has been named by the decedent in such a Declaration, then the personal representative appointed by a Court can make the decision. If no personal representative has been appointed, then the person nominated by the decedent to be the personal representative has priority to make the decisions. The list continues in the statute setting out the further order of who gets to make the decision.

The key takeaway from all of this is the importance of setting forth one's wishes in a Declaration of Last Remains. Don't leave the decision to chance. Also, be sure someone can find the controlling document, so those wishes can be honored.

Meet Mr. and Mrs. Daniels:

The marriage of Mr. and Mrs. Daniels was the second for both of them. They both had children from their prior marriages. When Mr. Daniels died, his children had his remains buried in his family plot in a Utah cemetery, where his first wife was already buried. The living Mrs. Daniels tolerated this, but a family conflict developed over what was written on Mr. Daniels headstone. A second battle erupted after the later death of Mrs. Daniels. Mrs. Daniels wanted her own remains to be buried next to those of Mr. Daniels. She made her wishes known only through discussions with her children. After her death, her children attempted to comply with her wishes to be buried next to Mr. Daniels. The children of Mr. Daniels, however, fought long and hard to keep Mrs. Daniels out of the family plot in the Utah cemetery. The stepchildren even took her headstone down at one point in the conflict. It was a dreadful fight, which eventually was resolved through some delicate negotiations among all the children and their counsel. All this heartache, stress, and legal expense could

have been avoided if both Mr. and Mrs. Daniels had prepared a written declaration of their wishes concerning burial instead of relying only on oral communications. The takeaway: if it is important to you or if there are family dynamics likely resulting in a conflict after you are deceased set out your burial wishes in writing.

Death Certificates: The personal representative will need to decide how many death certificates to order. The personal representative will likely be asked about the death certificates when they are at the mortuary. In many estates, the personal representative will not need more than a few death certificates. It is acceptable in most estate transactions to use a copy of the death certificate. The personal representative may need to record an original death certificate for purposes of transferring real property held in joint tenancy, but typically originals are not needed for much more. We generally recommend ordering five original death certificates, at most, as this typically is sufficient. Remember, the personal representative can always order more if they are needed later.

Finding the decedent's estate planning documents: If the personal representative is lucky, the decedent will have left their documents neatly organized, and in a location easily found. What you are looking for are the relevant estate planning documents. These can include the decedent's will, a trust created by the decedent, a trust created by someone else but of which the decedent is a beneficiary, one or more beneficiary deeds, beneficiary designation forms from a life insurance company or a retirement account, documentation of joint tenancy property (for example, real estate or motor vehicles), other deeds to real estate, and banking and investment account statements to name the most common relevant documents.

✦ **Really Important Point:** Estate planning documents are more than just a will. There are many ways to provide for your estate assets to pass upon death. An important part of the planning process is to coordinate all of these different types of assets into a cohesive plan. If you are called upon to help with the administration of an estate, you can only hope these different ways of disposing of assets have been coordinated by the decedent into a coherent estate plan.

The decedent's relevant estate planning documents need to be preserved. We have seen cases where documents are alleged to have disappeared. If the decedent's "last" will disappears and had different beneficiaries from an earlier will, it's possible that the earlier will could be the document used to determine the distribution of the estate. In our experience, not all beneficiaries are honorable. Be careful with the original estate planning documents.

Asset information is needed: What did the decedent own that needs to be distributed? You need to start collecting titles to real property (such as a home, second-home, or investment real property) and personal property (such as titles to cars, motor homes, motorcycles, *etc.*). There will likely be bank and investment account statements, along with the documents that were used to create the accounts. These initial account documents could include "pay on death" terms and instructions. These assets are commonly referred to as "non-probate" assets, and they are not necessarily under the control of the personal representative. However, it is important to look for them to ensure the decedent's wishes are fulfilled. For instance, you will want to locate any life insurance and retirement accounts along with their beneficiary designation provisions, if any. You should talk to the relevant life insurance companies,

investment advisors, or bankers to make sure you understand any beneficiary designation provisions that may exist.

Many assets are non-probate by their nature. These non-probate assets may include, but are not limited to, joint tenancy holdings and accounts, life insurance, and retirement accounts. You need to be on the look-out for these assets. More on this later.

The task of the personal representative of an estate is to administer the assets subject to the provisions of the Probate Code. The personal representative has the duty to control and dispose of the "probate" assets. When a decedent dies there can be many other assets owned by the decedent that are *not* subject to the control of personal representative. Technically speaking it may not be the personal representative's job to chase down these non-probate assets, but there are often reasons why the personal representative will want to know about such assets.

It is the duty of the personal representative to file any final income tax returns for the decedent, as well as any estate tax return that could be required. For purposes of filing an estate tax return, the personal representative needs to know the nature of the decedent's assets, including both probate and non-probate assets. The personal representative has a duty to inquire about the valuation of all of the decedent's assets, even though the personal representative does not necessarily have the duty to deal with all the assets owned by the decedent.

Securing the assets and cleaning up the "mess." If the decedent owned a residence, make it a priority to secure the residence and all of the assets located therein. The personal

representative will need to prepare an inventory of the estate assets, and you will want to insure nothing disappears. Assets do sometimes get "legs" and simply disappear. We see this most often with the decedent's personal effects and household goods. Make sure the house does not get looted by family members who feel entitled. This does happen. The same warning applies to larger assets as well, so keep an eye open for this possibility.

Also, as much as we all like to think we have left our household and personal effects in order, such is usually not the case. If you have to secure the residence, it will be hard to know ahead of time what you will find. As we all know some folks are more orderly and cleaner than others. In extreme cases of hoarding or unsanitary conditions, specialized service companies may be called upon.

Meet Mr. Jackson:

"Unbelievable" is the only word to describe what the personal representative found when entering the house of Mr. Jackson after his death. Mr. Jackson was a recluse with no children and only a nephew to help him. The nephew, however, had not seen Mr. Jackson or his house for years. In the end, it was just Mr. Jackson, his dog, and the squalor he left behind.

Walking through the house was awful. Mr. Jackson had a hoarding disorder. The house was filled to the brim. The nephew had to navigate waist high junk just to go from room to room. The floors, furniture, and bed sheets had not been cleaned for a very long time. There were stains and filth throughout the house.

Securing the assets of the estate are sometimes not as easy as you might expect. Often a cleaning crew and remodeling

contractors become a necessity. Personal representatives may find it necessary to take on such tasks or hire them out. A personal representative can learn from the experience and not leave his or her own estate in such a state of despair. Clean out the closet filled with old papers, VCR tapes, and photo albums. Keep the house tidy. Don't leave the task to your heirs or personal representative. Cleaning and thinning out your possessions will make securing the house and personal property much easier, and it will save the estate from the cost of contractors and cleaning crews.

1.2 TIME TO SET SOME APPOINTMENTS

Now that you have handled the funeral arrangements and gathered up all of the decedent's relevant documents, it is time to set some appointments.

Your first stop should be to reach out to an attorney who can help you understand the decedent's estate plan and the process you must embark on in settling the probate and the non-probate estate. For instance, you may need some guidance on how to transfer title to joint tenancy property to the surviving joint tenant. This is particularly true with real property, where a supplemental affidavit is required to be recorded along with a death certificate in the county in which the property is located.

Other examples where you want professional direction could be with life insurance and IRA beneficiary forms that may have been executed by the decedent.

Lest we forget about taxes, a trip to the decedent's accountant would also be extremely helpful. First of all, the decedent may still need to file a personal income tax return on income earned after January 1 in the year in which the

decedent died. The tax return would be the "final" income tax return for the decedent and typically reflects the usual deductions the decedent could have taken. An accountant can give the personal representative direction on this final return.

Additionally, keep in mind that the estate becomes a new taxpayer on the date the decedent dies. Usually, the estate must file an income tax return reporting income from the date of death to the end of the calendar year in which the decedent died. An accountant can advise the personal representative regarding the reporting of investment income, which is usually reported on a Form 1099 and is sent by the investment company around the end of January in the following year.

Investment income (interest, dividends, capital gains, and capital gains distributions) should be reported on the individual return for the year of the decedent's death through the date of decedent's death. Income earned after the date of the death should be reported to a new taxpayer (the decedent's estate). The estate will have a different taxpayer identification number and will not use the decedent's social security number.

✦ **Really Important Point:** You probably don't do your own annual physical exam, draw your own blood, or self-administer other invasive medical procedures. Instead, you seek out a trained professional to guide you. Do the same with handling an estate. Seek out a lawyer, an accountant, investment advisor, or other trained and experienced professional to help guide you. This guidance does not necessarily mean a large expense. It may just be an hourly fee for some guidance that can help answer many of your

questions. As they say, “an ounce of prevention is better than a pound of cure.”

CHAPTER 2

WHAT IS "PROBATE" AND HOW DOES IT WORK?

2.1 WHAT PROBATE IS NOT?

As we stated above, the probate process usually only controls "probate" assets. To begin our discussion of the probate process and probate assets, let's first clarify what is not a probate asset subject to the probate process. Retirement accounts and life insurance proceeds are controlled by a "beneficiary designation." These forms are usually prepared and executed by the decedent with his or her financial advisor or life insurance agent. Unless the beneficiary designation form names the decedent's estate as beneficiary, these assets will not be probate assets. Property held in joint tenancy is controlled by the title document, which could be a deed to real estate or title to an item of personal property, such as a car title. Similarly, the disposition of property subject to a beneficiary designation agreement is controlled by the agreement itself.

We will talk more about non-probate property and how it is transferred on decedent's death in a later chapter. For now, recognize there is an important difference between probate and non-probate assets and how they are handled in a decedent's estate.

2.2 WHAT IS PROBATE AND HOW DOES IT WORK?

2.2.1 DEFINING SOME KEY TERMS

Losing a loved one is difficult enough, but throw in terms and procedures that are unfamiliar, and it can feel beyond overwhelming. When faced with the task of administering an estate, you will no doubt come across a great deal of "lingo" that may be unfamiliar and understanding a few key terms can be very helpful. So, let's start at the beginning with a few definitions.

You'll hear a great deal about the **"estate,"** and you may be wondering exactly what that means or entails. Simply put, if a person has any personal property or real property when they die, then they have an estate. It could be worth $900 or $900,000; it is still an estate.

Next, be aware that there are different types of estates. There can be a "probate" estate, a "trust" estate, the "taxable" estate, and a "non-probate" estate, to name a few. For purposes of this Chapter, we will be referring to the probate estate.

You may have heard the term **"Executor."** An "Executor" is the person named in the Will to carry out the desires of the decedent (the deceased person) as expressed in the Will and to administer the estate according to the law. An "executrix" is the feminine form of the word "executor."

An **"Administrator"** is a person appointed by the court to settle the estate in accordance with law where the decedent left no will. An "Administratrix" is the feminine form of the word "Administrator." Under Colorado's Probate Code

terminology, an "Executor," "Executrix," "Administrator," and "Administratrix" are all **"personal representatives."** In short, all of these terms are names given to the person that the court authorizes to distribute the decedent's property according to the decedent's wishes as expressed in their will. If there is no will, the personal representative will distribute the decedent's property according to state law. In this book we will be using the term "personal representative." When you hear the word "executor," you can usually assume correctly that the person is referring to the personal representative of the estate.

It should also be noted there can be more than one personal representative. Co-personal representatives can be appointed by the court, and they usually have to act in tandem and in unanimous agreement. Before nominating co-personal representatives in a will or seeking the appointment of co-personal representatives by a court, be aware that requiring two people to approve every estate action can add a layer of administration and potentially slow down the probate process.

If there is no will nominating who is to act as the personal representative, Colorado law directs who is to act. The order of priority generally depends upon the marital status of the decedent at the time of death and the nature of their family structure.

C.R.S. § 15-12-203 sets out the order of priority for the appointment of a personal representative. Keep in mind there are rights to act as the decedent's personal representative that could be set out in a designated beneficiary agreement, C.R.S. § 15-22-102 *et seq.* Also, be aware of the Colorado Civil Union Act, found at C.R.S. §14-15-101 *et seq*., where the surviving party to a civil

union has rights to act as a personal representative in some instances.

Probate, also known as **estate administration**, describes the entire process by which a decedent's estate is collected, administered, and distributed. In the probate process, the purpose of the appointment of a personal representative is to have someone with legal authority to wind up the decedent's affairs. This typically involves the collection and valuation of the decedent's probate assets, the payment of debts, expenses of administration, and taxes, and the distribution of all remaining assets to the persons entitled thereto. This is generally described as administering or settling the estate.

The probate process is a court supervised proceeding. Documents commencing the probate proceeding need to be filed in the court where the decedent resided upon his or her death. Although the court is involved, the personal representative will not necessarily need to appear before a judge. Court appearances are typically only required when the court feels a need to review the financial transactions in the estate, there is a need to address the issue of compensation for the personal representative, court approval is needed to liquidate a particular asset, or court guidance is needed by the personal representative in interpreting the will or making distributions from the estate to the beneficiaries.

The court is the friend of the personal representative. The court is not to be feared.

✦ **Really Important Point:** The rules we are discussing apply to Colorado residents. Similar rules may apply in different states, but do not count on it. Each state will have its own probate code with its own particular rules.

To commence a probate proceeding in Colorado, generally, the decedent must be a Colorado resident on the date of his or her death.

Non-residents with Colorado-based assets (*e.g.*, real estate, mineral rights) may need to commence a Colorado probate to dispose of the decedent's Colorado assets. Such a proceeding is commonly referred to as an "ancillary" proceeding, which is conducted in concert with an estate proceeding in the state where the decedent was living at death. Pursuant to C.R.S. § 15-13-101, the personal representative in another state is given the authority to act in Colorado, with all the same authority granted to a personal representative originally appointed in Colorado.

An estate may be **"testate"** or **"intestate."** If a person has a valid will that legally and completely covers the disposition of their entire estate when they die, then the estate is testate. If a person dies and they did not have a valid will at the time of death, then the estate is intestate. The probate procedures ultimately required may depend on whether the estate is testate or intestate. (More on this later).

2.2.2 TESTATE VS. INTESTATE PROCEEDINGS

It is important to understand the difference between a testate and an intestate probate proceeding. A "testate" probate proceeding is used when there is a will that is submitted to the court and used to guide the wishes of the

decedent regarding the administration of and distributions from the estate. An "intestate" probate proceeding is one that administers an estate in accordance with the laws of Colorado because there is no valid will.

Meet Ms. Grant:

Upon the death of her mother, Ms. Grant presented a handwritten will (a "holographic will") signed by her mother, leaving the majority of her estate to Ms. Grant. Her siblings were quite upset, but acknowledged it was Ms. Grant who was closest to their mother and had been her caretaker for several years prior to her death.

The handwritten "will" did not mention it was intended to be her will, although it was enclosed in an envelope labeled "My Last Will and Testament." The issue presented for the siblings to squabble over was whether the document was a valid will. If it was not a valid will then a prior will decedent had signed would constitute her last will. The prior will purported to distribute the assets equally among the adult children, an outcome not favored by Ms. Grant.

So, what is the point of this story? Well, often people will try to do their own handwritten will and the document will fall short, as did this document. Although the siblings reached a settlement regarding the division of the estate assets, it cost a significant amount of stress and fees to get the matter concluded. The cost of a professionally prepared will would have cost much less than the fight over decedent's home-made will.

This story is really about the need for people to recognize the importance of getting their documents in order before they lose capacity or die and to do it professionally and accurately. Don't create a shoddy estate planning

document that leaves a confusing estate to be fought over or cleaned up by the personal representative.

*Another case involved **Mr. Dodge**, who typed an email with his wishes for the disposal of his estate upon his death. Mr. Dodge had young children and was knee deep in a divorce proceeding. Did the email constitute a will? Where does a will intersect with the rights of a surviving spouse when a divorce is pending? Yet another mess left for others to clean up.*

C.R.S. § 15-11-503 is a Colorado statute, that can sometimes save the day for homemade documents intended to be a decedent's will but not executed with the formalities of a will. Such was the case of Ms. Grant and Mr. Dodge. It provides, in part, as follows:

"Although a document, or writing added upon a document, was not executed in compliance with section 15-11-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute … [t]he decedent's will."

The application of this statute to rescue a defective homemade will usually require court involvement. It is one of the most useful statutes available to help a defective document be legally recognized as the decedent's will. Note, however, that the standard of proof to rescue a defective document under this statute is "clear and convincing." This is a much higher standard of proof than what is typically required.

In a testate probate proceeding, the original will is filed with the District Court in the county where the decedent resided at the time of death. The Court keeps the original will indefinitely. If at any time the personal representative needs a certified copy of the will, this can be obtained from the Court for a fee. Certified copies of the will are typically not needed during the probate process, however, if the need arises, know that a certified copy can be obtained.

2.2.3 WHO TAKES THE ESTATE WHEN THERE IS NO WILL?

Determining who is entitled to a decedent's estate if there is no will can be confusing. Hang in there and we will try to explain. Generally, look to C.R.S. § 15-11-101 *et seq*. Here, you will find the rules that determines how the decedent's estate will be distributed if there is no will or if the will fails to distribute all of the decedent's assets.

If a decedent is married, the surviving spouse takes the entire estate if:

A. decedent has no surviving descendant or parent; or

B. all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent.

If neither of these situations is present, the surviving spouse will receive:

- The first $300,000, plus 3/4 of the balance if decedent has surviving parent(s), but no surviving descendant.

- The first $225,000 plus 1/2 of the balance if decedent has surviving descendants all of whom are descendants of the spouse, and spouse has one or more surviving descendants who are not descendants of the decedent.

- The first $150,000, plus 1/2 of the balance if decedent has one or more surviving descendants who are not descendants of the surviving spouse.

[C.R.S. § 15-11-102(1) through (4)].

The foregoing dollar amounts are to be adjusted for cost of living as determined under C.R.S. § 15-10-112. [C.R.S. § 15-11-102(6)].

If the decedent has no surviving spouse or a designated beneficiary designated pursuant to a designated beneficiary agreement under C.R.S. § 15-11-102.5, then look to C.R.S. § 15-11-103. Here, you will find how the intestate estate is to be distributed.

When a decedent's estate has to be distributed to his or her heirs in accordance with Colorado's intestacy laws, keep in mind the decedent may have had adopted, natural, or genetic heirs (think, assisted reproductive technologies). The laws regarding these situations can be found at C.R.S. § 15-11-115 to 122. If life were not complex enough, now we have potentially unborn heirs to consider. Be careful!

2.2.4 FORMAL VS. INFORMAL PROCEEDINGS

The difference between a formal and informal probate proceeding is also important to understand. C.R.S. § 15-12-301 sets out the law regarding an informal proceeding. Informal proceedings can utilized be in both testate and intestate proceedings. In its simplest terms, an informal proceeding allows the clerk of the court (the "registrar") to enter the orders of the court that issue the "letters testamentary" (sometimes referred to simply as "letters") to the personal representative,

Once the letters are issued, the probate proceeds with minimal oversight by the Court unless an interested party in the estate lodges an objection to something that has or has not happened.

"Letters" are evidence of appointment of a personal representative. Letters are the formal document that grants authority to the named personal representative to act on behalf of the estate. You can think of it as the "driver's license" allowing the named personal representative to drive the estate.

A formal probate proceeding is often litigation (*i.e.*- a court fight) to determine the validity of a will. Look to C.R.S. §15-12-401 for the laws relevant to a formal proceeding. In a formal proceeding there are usually more restrictions on the personal representative's ability to administer the estate. The Court is more involved in supervising the administration and it gives direction to the personal representative. If parties to an estate contest the validity of the will, the Court will make the ultimate determination in a formal proceeding.

Note that the court can convert an informal proceeding into a formal proceeding prior to the closing of the estate. There are often tactical reasons why the personal representative or heir may want to convert an informal proceeding into a formal proceeding. These matters should be discussed with experienced legal counsel.

Meet Mr. Swanson.

Mr. Swanson was one of three brothers and his mother's will nominated him to serve as personal representative. An informal probate proceeding was commenced, and Mr. Swanson was appointed to act as the personal representative.

During the administration of the estate, assets kept disappearing: the coin collection, guns, family photo albums, and a variety of other personal property items. Yes, many items were alleged to have grown legs. The siblings all pointed fingers at one another, claiming the other was the culprit.

When it came time to close the estate, we advised Mr. Swanson to convert the proceeding to a "formal" proceeding and to set a hearing where the court could review the accounting in the estate, the distributions from the estate, and any other issues any of the siblings wanted to bring up in the way of alleged "mismanagement" in the estate by the personal representative.

The matter was set on the court calendar for a "non-appearance" hearing, meaning a day and time was set and if anyone wanted to object, they needed to do so or risk being forever barred from bringing up any issues in the estate. The personal representative did not need to appear in court for the non-appearance hearing. There were no

objections filed, and therefore the personal representative's actions in administering the estate were approved and the personal representative was released from any liability arising out of his service as the personal representative. The door was closed against further actions against the personal representative.

To this date, the siblings don't stay in contact and their brotherly love has been shattered by their conduct during the estate administration proceeding. Unfortunately, what appear to have been lifelong grudges came to light in the estate proceeding. Unfortunate, but such squabbles do occur. Beware!

2.2.5 POWERS AND DUTIES OF AN APPOINTED PERSONAL REPRESENTATIVE.

The powers and duties of the personal representative are set forth in the Probate Code at C.R.S. § 15-12-701 *et seq.* As a general rule, the powers of a court appointed personal representative are broad, giving the personal representative the necessary powers to assemble the probate assets, pay the creditors of the estate, and distribute the estate assets to the beneficiaries as set out in the decedent's will.

If the personal representative needs assistance with the administration of the estate, he or she can file a petition seeking direction from the court. This is a very powerful tool that can be used by the personal representative. It is important to remember that the court is the friend of the personal representative and should be used when needed.

Meet the Swift Brothers.

A large landholder in southwest Colorado appointed her lawyer, Mr. Swift, as the personal representative of her

estate. Mr. Swift had been the decedent's long-time lawyer, helping on many family business matters through the years. The landholder/decedent thought it was a logical choice to have Mr. Swift help with the administration of his estate.

The children of the deceased were "ticked off" to say the least. They thought they were entitled to act as the personal representative and felt the long-time family lawyer was overreaching and was an unnecessary expense to the estate.

The children also could not agree on the time of day, and thus then locked horns over almost every issue in the estate. Through the liquidation of estate assets, filing of the federal estate tax returns, and making of distributions from the estate, the decedent's children fought not only each other but also the personal representative and anyone else involved in the quest to move the administration of the estate forward.

So, time and again into court the personal representative went asking for court direction on how best to proceed. Doing so cost the estate a substantial sum of money, in addition to what already was being spent on other professional services. Ultimately, the court was the friend of Mr. Swift and helped insulate him from liability for the administrative actions he needed to take. Being a personal representative can be a thankless job, so beware taking it on and know the risks of doing so.

For the heirs, you can see what their antagonism toward each other and Mr. Swift brought. Mr. Swift needed to have his own legal counsel. The cost skyrocketed when the court intervened to help direct Mr. Swift on how to proceed. The heir's actions were counter-productive to efficient estate

administration. As you may learn, often times fights in an estate are about more than just the money.

2.2.6 NOTIFICATION OF DECEDENT'S DEATH

Once appointed, the personal representative should notify all of the decedent's banks and other financial institutions of the decedent's death. An exception to this rule arises if the decedent's account is held in joint tenancy. Such an account would be owned by the surviving joint tenant. In such as case, the bank should be notified to remove the deceased account holder's name from the account.

Giving notice to companies that the decedent had dealings with is especially important where the personal representative does not perceive a need to continue using such company's services. This will likely include credit card companies, telephone/cell phone companies, cable television companies, and others. Generally, it is appropriate for the personal representative to pay outstanding balances owed for utilities that are necessary to keep a house maintained until it is distributed or sold.

2.2.7 CREDITOR'S RIGHTS IN A PROBATE PROCEEDING

If the decedent owed debts upon his or her death, the estate is generally obligated to pay these debts as part of the probate proceeding. The personal representative has duties to protect the assets of the estate, subject to the rights of valid creditors.

To start the process of identifying the valid creditors, a notice must be published in a newspaper of record where the decedent lived at the time of his or her death. If a creditor has a claim, the claim must be filed **within four months** after the first publication of the published notice to creditors. The claim can be made either by filing them with the court or by presentation to the personal representative by mail or hand delivery. Claims need not be on a special legal form. Generally, a regular bill or other statement for services will suffice as a legal claim. Under the Probate Code, claims are automatically deemed to be allowed if the personal representative does not take steps to disallow them within 60 days after the end of the claim period.

As set out in the notice to creditors, creditors have until the date specified to submit their claims to the personal representative or to the court for payment.

If a personal representative knows of a creditor, a creditor's notice can be mailed to the creditor. There may be tactical reasons to do this. A United States Supreme Court decision has allowed a creditor's claim beyond the claim filing period where the estate relied only on a published notice. This has created some confusion in administering estates. So, where the creditor is known, notice should be mailed if the intent is to dispute or deny the claim.

Also, we sometimes recommend mailing a notice to a creditor where the personal representative is aware of the creditor but may not know the amount of the claim. Direct notice to a creditor may also be appropriate in cases where there may be some question as to the validity of a creditor's claim.

If a claim is disputed, the personal representative should provide the necessary documentation to the attorney assisting with the estate administration to enable him or her to prepare the documents necessary to deny the claim. So long as the personal representative pays the creditors of the estate (the decedent's creditors), it will not be necessary to provide separate notices to those creditors. The personal representative should keep careful records of all bills paid. The payment of creditors will be detailed on the Final Accounting for the estate.

It is important to determine whether the Colorado Department of Health Care Policy & Financing (Medicaid) is a creditor of the decedent's estate. Such claims may arise as a result of the decedent having spent time in a skilled nursing home facility. Medicaid claims have priority over certain other creditor claims and distributions to beneficiaries. As indicated on the Information of Appointment (a document sent to all interested parties at the beginning of the probate process), a courtesy copy will be sent to the Department of Human Services in the county where the decedent may have received services, providing it notice of the opening of the probate estate and appointment of a personal representative.

A notice to creditors will also be mailed to the local Department of Human Services and the Colorado Department of Health Care Policy & Financing advising it of the deadline to file a claim. Even though the creditor's period is four months from the date of the first publication of the Notice to Creditors, Colorado Department of Health Care Policy & Financing might file a claim up to one-year from date of death. If this occurs, a disallowance of claim may be filed as the claim would be untimely. The personal representative should review this process and seek counsel

experienced in dealing with claims from Colorado Department of Health Care Policy & Financing.

Credit card companies fall into a different class of creditor. It is usually not recommended that the personal representative make payments on any outstanding credit card balances until after the expiration of the creditor's period. This should be reviewed from a tactical perspective.

In addition to providing notice to creditors, it is important to notify the major credit reporting agencies of the decedent's death and to obtain a copy of the decedent's credit report. Getting a credit report will help the personal representative identify creditors of the estate. Having a credit report can also help to avoid identity theft.

To notify the major credit reporting agencies of decedent's death, written notice should be sent to the agencies at the addresses below. Include a copy of the decedent's death certificate and a copy of your Letters.

Experian P.O. Box 4500, Allen, TX 75013

Equifax P.O. Box 740241, Atlanta, GA 30374

TransUnion P.O. Box 2000, Chester, PA 19016

You will need to let them know the following:

1. The date of the decedent's death;

2. You have been appointed the Personal Representative of the decedent's estate;

3. Please flag the account with the statement "Deceased: Do not issue credit."

With your written request, you can also request one of the agencies send to you a free copy of the decedent's credit report. The attorney you work with will also need a copy of the credit report.

Meet Mr. T

Mr. T was an amazing artist and athlete. He was less so of a money manager. Upon his death he had numerous works of art in his inventory and an abundance of credit card debt. Colorado law provides that if a probate proceeding has not been commenced, a creditor can apply to be appointed the personal representative. Once appointed, the creditor can then seek satisfaction of the creditor's claim from the assets of the estate.

C.R.S. § 15-12-803 (1) (a) III provides a creditor must file a claim in the estate within one year of the decedent's date of death, otherwise the creditor is barred from ever filing a claim and having the claim satisfied.

Whether to open a probate proceeding for Mr. T. became an issue for discussion. Mr. T did not leave a will, so all of the assets in the estate would only transfer to his heirs as provided by Colorado's intestacy law (see paragraph 2.2.2 above). This requires opening a probate proceeding, and if opened within one year of death, it would be necessary to notify the creditors (primarily the credit card companies) of their right to file a claim. Liquidating the art collection would be necessary to satisfy the claims of Mr. T's credit card companies.

Ultimately, the decision was made to not open a probate proceeding until more than one year after the decedent's death. The calculated decision was made that the creditors (many of them in not so large amounts, but enough in total to require liquidation of the decedent's art collection) would not open the estate to file the creditor's claim within the one year time period after the decedent's death.

The calculation paid off — no creditor filed a claim. An heir opened probate after one year, and the assets in the decedent's estate were transferred to the heirs instead of being liquidated to pay off the credit card debts. This is the way the law works, so in the right situation consider following the lead of Mr. T's heirs.

2.2.8 INVENTORY OF THE ESTATE ASSETS

Decedents' estates often include one or more of the following types of assets:

1. Real Property
2. Bank and Investment Accounts
3. Vehicles
4. Personal Property
5. Business interests

As mentioned above, it is import for the personal representative to assemble, collect, and value all of the "probate" assets and prepare an inventory of these assets within three months from the date the personal representative is appointed

by the court. While the inventory is not due until three months from the date of the appointment, it can be finalized before that time. Generally, the assets of the probate estate include all assets that were titled solely in the decedent's name or payable to the decedent's probate estate.

Again, assets that passed to individuals pursuant to beneficiary or payable on death designations or to a surviving joint owner are not included in the probate estate. These types of assets typically include life insurance, retirement accounts, and payable on death accounts at financial institutions.

There is a court approved form that a personal representative can use to complete the required inventory. In the inventory form, you will want to value the assets as of the date of death. The inventory is due within three months of the date of the appointment of the personal representative. If the inventory is requested, it is usually distributed to the heirs of the estate as identified in the will or the heirs as described by Colorado's intestacy statutes. There is no requirement that the inventory be distributed. There are tactical reasons why the personal representative may not want to distribute it to the heirs as a matter of course. The personal representative can amend or supplement the inventory if additional assets are discovered after the original inventory has been completed.

2.2.9 GETTING THE PROBATE ESTATE READY TO DISTRIBUTE

Generally, the probate assets can be distributed in kind (meaning a specific asset, such as a house, is conveyed directly to the heir) or the assets can be liquidated, turned into cash, and then the cash is distributed to the heirs.

✦ **Really Important Point:** Unless the personal representative is the only beneficiary of the estate, it is generally recommended the personal representative communicate with the heirs on a regular basis concerning the administration of the estate, whether legally required or not. Communication is important to avoid misunderstandings and disputes. Regular communication should also decrease the chance that any of the heirs will be surprised when it comes time to distribute the probate estate. Managing everyone's expectations regarding the administration is important to avoid hard feelings among the heirs or creating a conflict before the distributions are to be made.

For example, don't sell the family cabin unbeknownst to the heirs. Similarly, summarily selling an antique car collection might not be the best action if specific cars are coveted by one or more of the heirs. If selling an asset is the most prudent course of action, it may be possible to sell it to an heir or close family friend for fair market value to avoid any hard feelings or conflict. Common sense should be used when dealing with the estate assets.

2.2.10 MAKING DISTRIBUTIONS FROM THE ESTATE

Making the distributions from the estate present some interesting issues that should be considered before closing the estate. First, distributions do not necessarily have to come at the very end of the proceeding. Often, the administration gets delayed because there is one or more assets that are difficult to dispose of. We see this in the case of real property or business interests, which may take months, if not years, to finalize the liquidation.

Therefore, making an interim distribution may make sense. The personal representative may wish to make such a distribution, and if so, may want to require a receipt and release of the personal representative through the date of the distribution for any acts up to and through the date of that interim distribution.

In chapter 5.2 we discuss how conflicts may occur in the administration of an estate. In such cases, making an interim distribution to an heir may in effect provide the heir with funds to fight with the personal representative. Getting the release from an heir prior to the interim distribution could be important. It may be wiser yet to simply not make interim distributions if the money will be used to increase the litigation in the estate.

Note that final distributions should occur only after all estate affairs have been concluded. This includes paying all taxes, filing all final income tax returns, and paying all final expenses of the estate.

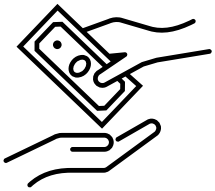
Distributions from the estate do not have to be in cash or cash equivalents. Distributions can be made in kind, which means distributing a specific asset in whole or in part to a beneficiary of the estate. In kind distributions can involve a variety of estate assets, such as a car or a certain parcel of real estate.

Finally, make sure you understand the distribution terms of the will. Often the distributions are to be made outright, such as transferring assets directly to the estate beneficiary. At other times, the distributions may be to the trustee of a trust created within the will (a testamentary trust) or to a trust created during the decedent's lifetime (an inter-vivos trust). An inter-vivos trust can carry on after decedent's

death, and assets distributed to the trust must be managed in accordance with the terms of the trust.

2.2.11 CLOSING THE PROBATE ESTATE

Once the personal representative has collected all of the assets of the estate, paid all of the creditors who are legally entitled to be paid, and distributed the estate assets to the beneficiaries of the estate, then the court probate proceeding can be closed.



There are a couple of options for closing an estate. The first is to file with the court a closing statement indicating all matters in the estate have been finalized. In this case, the personal representative is still subject to the jurisdiction of the court and is not released for one year after the filing. During that year, the court can open the estate for any reason, including an inquiry of a disgruntled beneficiary or creditor of the estate.

A second option is to close the estate formally. This requires the personal representative to set a day and time for a hearing before the court. The proceeding is usually set as a "non-appearance" hearing, meaning there is no actual hearing unless someone—usually a creditor or a beneficiary of the estate—requests an actual hearing to raise an issue with the court. Such issues typically involve the personal representative's handling of the estate.

When the estate is closed formally, absent a successful complaint being put forward, the personal representative is dismissed from their role as personal representative, the actions of the personal representative are approved by the

court, the final accounting of the personal representative is approved by the court, and the personal representative is released from liability and any further obligations to the estate and beneficiaries.

A formal closing of the estate is the "safest" approach for a personal representative. By doing so there is finality to the proceeding, and rarely does scheduling a hearing present any contentious issues for the out-going personal representative.

CHAPTER 3

TRUST ADMINISTRATION

3.1 WHAT IS A TRUST ADMINISTRATION?

First, let's make sure we understand the difference between a will and a trust. This will help us understand the differences in the administration of these two commonly used estate planning tools to pass assets upon death.

There are many different types of trusts, *e.g.,* revocable trusts, irrevocable trusts, tax-oriented trusts, inter-vivos (created during life) or testamentary (created at death) trusts, life insurance trusts, pet trusts, and special needs trusts, to name just a few. The type of trust we will be discussing in this chapter is the revocable trust. The revocable trust is generally used as a "will substitute." The revocable trust also goes by the name of living or inter-vivos trust.

The revocable trust is created by an individual (the grantor or trustor), during his or her lifetime. The grantor is the one who signs a trust agreement naming a trustee (usually the grantor) and naming the trust beneficiary (who is also usually the grantor). So, the three individuals usually identified in the revocable trust are the grantor, the trustee, and the beneficiary. This is the simplest essence of a revocable trust. All trusts have the same general characteristics of having the three positions set out above.

For a more in-depth discussion concerning the revocable trust, we suggest you read Chapter 4 in our companion book entitled *Estate Planning: The Basics and Beyond - Why There Is No Such Thing as a Simple Will.*

So, what happens when the trust grantor, trustee, or beneficiary dies? Generally speaking, when the grantor of the trust dies, nothing really happens to the trust. It continues to operate. The revocable trust becomes "irrevocable" when the grantor dies, since the grantor is usually the one who has reserved the right to revoke or amend the trust. If the grantor is dead, well you know the obvious, he or she can no longer revoke or amend the trust.

The trustee position "continues on", which may necessitate the appointment of a new trustee. Assuming the trust is a "plain vanilla" revocable trust, the trust document will provide for a successor trustee to replace the original trustee. It is the successor trustee who will administer the trust upon the death of the grantor. As noted above, often, the original trustee was also the grantor. There may be certain rights or powers reserved by the grantor of the trust when the trust was created that should be reviewed.

The successor trustee will perform tasks like the personal representative in a probate estate, *i.e.,* identify and assemble the trust assets, pay any final income taxes that may be owed by the grantor and/or the trust, and distribute the trust assets to the trust beneficiaries according to the terms of the trust.

The trust may provide for an outright distribution of the trust assets to the beneficiaries, or it may call for trust assets to continue to be held in a separate trust for the named beneficiary or beneficiaries. For example, a distribution from a trust to a disabled beneficiary may be held in a special needs trust, which is funded during the disabled beneficiary's lifetime with the trust assets being non-countable for purposes of public assistance planning. As another example, the original trust may call for trust proceeds to be payable to a trust for a minor and may provide that the trust be used to pay for educational expenses for the beneficiary through college or other post-secondary education. The terms of the trust documents will control what actions are necessary to be taken.

Keep in mind, even if a decedent has created a trust, there may still be reasons why a probate proceeding is needed. One common reason is that the decedent did not title all their real property or significant financial assets to their revocable trust before death.

In such a situation, there may be both probate administration by a personal representative and a trust administration by a trustee of the trust. This can happen if a personal representative is needed to pursue a wrongful death claim, complete litigation that was in progress at the time of decedent's death, or to handle any ongoing issues with the Internal Revenue Service or similar federal or state agencies. In such a situation, there may be both a probate administration by the personal representative and a trust administration by the trustee of the trust.

3.2 CROSS-OVER ISSUES BETWEEN A TRUST AND PROBATE ESTATE

Many of the same issues that need to be addressed in a trust administration by a trustee need to be addressed by a personal representative in a probate administration. For example, a trustee needs to coordinate the payment of taxes, gather, and liquidate assets within the trust, identify the beneficiaries of the trust, and distribute the trust assets according to the terms of the trust.

As is the case with a probate proceeding, the trustee needs to address creditors of the now deceased trust grantor. As discussed above in Section 2.2.7, in a probate proceeding, creditor claims must be formally filed to be considered as a "claim," and the validity of the claim may be contested. No such formality applies in the trust setting. The issues are similar but will be handled differently than they are in the probate setting.

With a trust there is not as much court oversight on the trustee, nor is there as much legal guidance on how best to proceed. Although Colorado has recently passed the Uniform Trust Code (found at C.R.S. §§ 15-5-101 through 15-5-114), the courts have not yet opined on many of its terms. There may be disagreement as to the meaning of many of its provisions for years to come.

3.3 PRIVACY ISSUES WITH A TRUST

A trust is intended to be a private document. It is an agreement among the three parties to the trust—the grantor/settlor, the trustee, and the beneficiaries. For many

grantors, one of the most important aspects of the trust is privacy concerning the assets of the trust (and those of the decedent), administration of the trust, and the trust distribution terms.

With a trust there are no required filings with the court and generally there is no judicial oversight. This, of course, has its pros and cons.

CHAPTER 4

NON-PROBATE TRANSFERS (OTHER THAN THOSE OF A TRUST)

Much of the wealth in the United States is held in a manner that does not require a probate proceeding upon death. Joint tenancy is the most prevalent form of holding title between married couples. Joint tenancy allows title to pass to the surviving joint tenant without a probate proceeding. There are also retirement accounts and life insurance, which pass to the beneficiary named in the beneficiary designation form without the need for a probate proceeding.

4.1 JOINT TENANCY WITH THE RIGHT OF SURVIVORSHIP

In its simplest terms, joint tenancy with the right of survivorship (commonly referred to as "joint tenancy" or "JTWROS") means upon the death of one of the joint tenants, the surviving joint tenant is entitled to the interest of the joint tenant who has died. For example, if A and B hold title to real property as joint tenants, upon the death of A, B will own 100% of the interest in the real property.

To document the transfer of A's title to B, it is necessary for B to record in the clerk and recorder's office for the county where the real property is located a certified copy of A's death certificate and a "supplemental affidavit." A supplemental affidavit is a legal document swearing that A, the decedent, is in fact the person named in the deed whereby the joint tenancy ownership was established. This

affidavit will allow the clerk and recorder to officially note that the title is now held 100% in the name of B.

If A and B were joint owners of a bank account, it is necessary for B to take a copy of A's death certificate to the bank to prove A's death. The bank will then transfer all the funds to B or open a new account in the name of B. Each bank has its own procedures, but this is the general idea.

The Department of Motor Vehicles has essentially the same procedure for a motor vehicle. The surviving joint tenant will present a copy (or sometimes an original is requested) of A's death certificate, and the title will be reissued in B's name alone.

Personal property is presumed to be owned in joint tenancy between spouses, provided the spouses have the items of personal property in their joint control. This presumption does not apply where the property was owned by one spouse prior to the marriage or if it was inherited during marriage. Personal property of a decedent can be a sticky issue where a will or trust does not provide for its distribution.

What about property held in joint tenancy by a married couple who later divorces but does not change their title during or after the divorce? Well, this is a great question, and the answer can turn on the intent of the parties and any other applicable documents, such as a separation agreement, the date the joint tenancy was created, *etc.* As in other areas we have discussed in this book, careful planning

and clear documents can avoid a lot of confusion and disputes later.

Meet the Kendrick sisters:

As frequently happens, one child is tasked with the duty of caring for an aging parent. This often involves paying the bills.

Some time ago, we were contacted by one of two sisters (A and B) involved with the administration of their deceased father's estate. His primary asset was a savings/checking account held in joint tenancy with sister A. The value was about $800,000 in total. Since the account was held in joint tenancy, it passed entirely to A by operation of law. Absent a clear case of financial exploitation by A, the $800,000 passed to A, and B had no claim to it.

A admitted her name was placed on the account for convenience only, enabling her to pay their father's bills prior to his death.

A was gracious and turned over $400,000 to B although she probably was not legally bound to do so. The sisters went on their merry way, never to be heard of again.

Fortunately, A and B wanted to do the right thing. The way their father had structured the bank account was fraught with peril. We have seen plenty of cases where siblings did not act the same way. Father's poor planning could have created serious conflict between his daughters that could have affected their relationship permanently.

✦ **Really Important Point:** The moral of the story is to be very careful when setting up accounts in joint tenancy. And be aware of such holdings when administering the estate. Issues may be lurking in the account ownership structure.

4.2 HOLDINGS SUBJECT TO A BENEFICIARY DESIGNATION

The use of beneficiary designations is most common with life insurance, annuities, and retirement accounts. Naming a beneficiary is part of the contract the decedent had with the life insurance company and/or the custodian of the retirement account (*i.e.,* a bank or other financial services company). Sometimes these forms are difficult to find in decedent's records. You may have to reach out to the company controlling the account to determine what the beneficiary designation form provides.

4.3 PAYABLE ON DEATH DESIGNATIONS

Payable on death designations are found primarily on bank accounts. They will be noted as "P.O.D." or "payable on death" on the agreements setting up the account. When you see such a designation, the legal meaning is the account balance becomes owned or transferable to the named designated beneficiary upon the account owner's death. Unless the decedent named their estate as the designated beneficiary, such accounts are not subject to control of the personal representative even if the decedent's estate requires a probate proceeding.

4.4 THE BENEFICIARY DEED

The Beneficiary Deed is a more recent addition to the list of legal documents that can create a non-probate asset. Section 15-15-404 of the Colorado Revised Statutes allows an individual to execute a deed conveying property to a third party that takes effect only upon the death of the grantor and not before. The important words to look for in the Beneficiary Deed are where the decedent "conveys on death" or "transfers on death" the property described in the deed. Such a deed can be useful to avoid probate of a particular parcel of real property.

4.5 CLAIMS OF CREDITORS AGAINST NON-PROBATE PROPERTY

Creditors of a decedent in a probate proceeding do have rights against certain non-probate transfers occurring at the death of the decedent if the probate assets are not sufficient to satisfy the claim. The rules are a bit complicated, and some non-probate transfers are not subject to creditor claims, *e.g.,* real property held in joint tenancy.

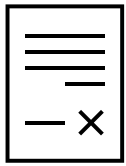
Holding assets in non-probate form may result in the creditor having a more difficult time finding out about the asset, but it does not mean the non-probate assets are exempt from such claims. If the situation arises where the probate estate cannot pay all of the claims against the decedent and other non-probate assets exist, be aware, as there are thorny issues to be addressed.

CHAPTER 5

COMMON ISSUES IN A PROBATE, TRUST, AND NON-PROBATE ESTATE ADMINISTRATION

5.1 THE COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT

In many situations the estate may not have adequate value to require opening a court proceeding to appoint a personal representative. A similar situation can arise where a decedent died without a will such that the assets will pass in accordance with Colorado's intestate laws. Remember, just because someone has died, a probate court proceeding does not necessarily have to be opened if the estate assets are below the statutory limit.



In such instances, Colorado law provides for certain "personal property" items to be distributed to those entitled to inherit from the decedent based on an affidavit signed by the person entitled to receive the property (C.R.S. § 15-12-1201). The affidavit is an alternative to opening a court proceeding. This is a convenient way to get titles changed and bank accounts paid over to the person entitled to receive those assets based on the death of the decedent.

There are a couple of noteworthy details. First, the affidavit cannot be used until 10 days after the death of the decedent.

Second, the value of the property of the entire estate must be less than $86,000 in 2025 (after deducting any liens and/or encumbrances). This amount is adjusted annually for inflation.

Third, the affidavit cannot be used to transfer title to real estate.

For a copy of the affidavit form, go to the Colorado Supreme Court website and look for form JDF 999. https://www.courts.state.co.us/Forms/SubCategory.cfm?Category

For motor vehicles there is a special form 2712 available at the Colorado Department of Motor Vehicles website at https://dmv.colorado.gov/sites/dmv/files/documents/DR%202712_e_wo%20%283%29.pdf

5.2 LET THE FIGHT BEGIN - YIKES!

It has been said "the blood turns green upon a decedent's death." This phrase refers to the greed of those who might inherit the assets of the decedent's estate. In our experience these fights may be more the rule rather than the exception. We have seen heirs fight over the smallest of issues and over huge sums of money or other valuable estate assets. We have even seen heirs fight over old shoes and rusted out woodstoves after inheriting a multi-million-dollar estate.

Some fights are more vicious than others. Many fights appear petty and are certainly not cost effective, but sometimes heirs just like to fight. Often the fight is not so much about the money but rather a grudge held by the heirs

from long ago. It may have been something one sibling did to the other in the "sandbox." It may be lingering feelings of "Dad always loved you more." We are not surprised at any motive, having seen them all!

Sometimes the fight takes the form of a will contest. In a will contest the dispute is often over whether the decedent had sufficient capacity to sign the testamentary document, such as a will or a beneficiary designation form. Another typical attack is to demonstrate a recipient of the estate unduly influenced the decedent to make the recipient the outsized beneficiary in the questionable document.

The administration of an estate where there is a legal fight can become complicated and EXPENSIVE. When the beneficiaries start fighting over who gets which assets from an estate, it usually involves multiple lawyers and the intervention of a court before the conflict is resolved.

Another problem area can arise if the personal representative or trustee decides to make a "deal" with the estate. This is commonly seen where estate assets are being purchased from the estate. Is the sale at fair market value? Did one of the other beneficiaries also want the particular asset in dispute? Self-dealing by the personal representative or trustee is fertile ground for a fight, so tread lightly!

Proper planning by the decedent can help avoid conflict from occurring, but sometimes conflict just happens. Aside from a will contest, there can also be a fight over the division of the personal property, the sale of certain items (rather than distributing them), and the amount of compensation paid to the personal representative for

administering the estate. The issues over which heirs can fight are almost endless.

Another frequent issue is the common law spouse. In Colorado, a common law marriage depends heavily on the intent of the couple and how they have held themselves out as being married. If the issue of common law marriage arises in an estate, it is often difficult and costly to resolve.

✦ **Really Important Point:** If there is an intent to get married, we generally recommend getting a marriage license and documenting the marriage. This is the easiest way to avoid heirs fighting about the issue after one spouse has died. Inheritance rights of a surviving spouse can bring a substantial economic benefit. Thus, the marital status of the surviving spouse often has sufficient consequences to warrant a fight, so it is best to not leave the marital status ambiguous.

If you wish to share a household with someone, but not get married, then state so in writing. Let the world know you are not married by signing a document setting out your intent. Don't hold yourself out to others as being married when you don't intend to be married. Duh!

Meet Mr. Green

Mr. Green lived into his 90s and had lost his first wife (and the mother of his two sons) to cancer. After her death, Mr. Green married a much younger woman who had been the home healthcare worker for his wife during her last months of life.

Mr. Green had lived a hard-working life as a rancher and farmer. After his wife's death, two important events

occurred in his life: he married the caregiver, and his landholdings became "gold mines" due to oil and gas drilling. Royalties were pouring into his bank account in the tens of thousands of dollars every month.

Well, Mr. Green wanted to care for his second wife, so he left her an interest in his real estate (and the royalties), much to the dismay of his two sons. Mr. Green had provided for his second wife at a time when his royalties were relatively small. When the royalties later became enormous, Mr. Green failed to reassess his assets and modify the way his estate plan provided for his second wife.

Mr. Green's sons had a substantial inheritance from their parents, but they still felt they deserved more of their father's estate. With a bundle of extra cash, the sons set out to get even more of their "fair share" and decided to create a ruckus over their stepmother's newfound wealth. In their minds, they felt it was fair to attack their stepmother's inheritance, alleging she had taken advantage of their aging father.

The fight was contentious, unpleasant, and generated substantial legal costs. Unfortunately, most everyone involved had more interest in fighting than trying to settle the dispute. Mr. Green was no doubt rolling in his grave and wishing he had chosen a different course for his estate planning.

✦ **Really Important Point:** If you are reading this book, it may be too late to avoid a fight in an estate. The best advice to be given, although often ignored, is to make sure you seek professional advice in *planning* an estate to help prevent a future fight in an estate. A person planning his or her estate has options to place "firewalls" within the estate

plan to discourage conflict. The firewalls often take the form of a "no-contest" clause, of which there can be a variety.

Keep in mind there is duty of "impartially" of the personal representative of a probate estate and trustee of a trust administration. Again, be careful. Treat all the heirs fairly and even handedly. Do not favor some over others.

5.3 WHAT IF THE ESTATE IS SUBJECT TO ESTATE TAX?

The payment of income taxes by the decedent (the individual) is usually not avoidable. Paying or reducing estate and inheritance taxes is typically avoidable by a decedent, depending upon their pre-death planning.

Colorado does not have any type of estate or inheritance tax. Most Colorado-based decedents have only the Federal estate tax to contend with.

For decedents dying in 2025, there is no estate tax on his or her estate provided the value of the estate, minus encumbrances and liens, does not exceed $13,990,000 per individual. For a married couple, this means they can transfer $27,980,000 at death without paying any estate tax. This is a whopping amount by almost anyone's standards.

Don't get too excited, as this estate tax exemption will be cut approximately in half at the end of 2025 if the Congress does not change the existing law.

✦ **Really Important Point:** If the decedent died in 2025 and might have a taxable estate, then the personal representative likely needs professional help (*i.e.*, a lawyer or an accountant) to navigate the estate tax filings. If there is a surviving spouse, there are several important matters to consider and possibly act on *promptly* after decedent's death.

Meet Mr. and Mrs. Pond:

Mr. and Mrs. Pond were wealthy, very wealthy. Most of the value of their estate was related to real property holdings. The estate tax owed by the survivor of the two of them was likely to be in the tens of millions of dollars.

As part of their estate planning, they created entities and sold interests in the entities to a trust, which required they continue to pay the tax generated by the assets sold to the trust for the balance of their lifetime.

With the complicated planning came the need for the personal representative to file a federal estate tax return and be prepared to battle with the IRS, if necessary. Fortunately, the IRS did not attack their planning, which was well documented and implemented.

5.4 THE "RIGHT TO ELECT" BY A SURVIVING SPOUSE

Under Colorado law, a surviving spouse (whether in a first or subsequent marriage) has the choice of accepting one of two estate plans. The first is the plan the decedent may have provided for the surviving spouse. This plan is usually one that leaves all the assets to the surviving spouse, with the understanding that the surviving spouse will "do the right thing" and leave the survivor's estate to the couple's

children upon the death of the surviving spouse. In this situation the surviving spouse has no reason not to accept the distribution from the decedent's estate plan.

Sometimes, however, the first spouse to die does not leave the entirety of his or her estate outright to the surviving spouse. In C.R.S. § 15-11-202, *et seq.,* the Colorado statutes set out the rights of the surviving spouse to elect against the estate of a pre-deceased spouse. If the deceased spouse leaves the surviving spouse less than the minimum amount Colorado law requires, the surviving spouse can elect to receive the "elective share" Colorado law provides to married persons.

There are several variables defining exactly what the "elective share" might look like, such as whether the children are the children of both spouses, how long the couple have been married, *etc.*

If the surviving spouse is not satisfied with the decedent's estate plan, under C.R.S. § 15 -11-203, the amount to be paid to the surviving spouse as an elective share depends upon the length of the marriage. After 10 years, the amount of the entitlement is 50% of the "augmented estate." Determining the amount of the augmented estate is a complicated calculation, to put it mildly. The personal representative or surviving spouse needing to address this issue will want to seek professional help.

✦ **Really Important Point:** If the surviving spouse wishes to elect against the will of the deceased spouse, he or she must do so within nine months of the date of the deceased spouse's death. It is very important not to miss this deadline.

Meet Sally:

Sally's husband died and left his share of their combined estate to a trust for the benefit of Sally. It certainly was a handsome sum, sufficient to sustain her for the balance of her lifetime. Sally had never really played a large part in managing the couple's finances. Her husband was concerned with Sally imprudently managing the inheritance and felt a professional trustee would be in a better position to invest the assets and dole them out to Sally.

Sally had the option of accepting the estate plan of her deceased husband or taking her elective share under Colorado law. If Sally accepted her husband's estate plan, she would have a corporate trustee in her life who would evaluate her needs and oversee the distribution of the trust assets to her.

If Sally went with the elective share, she would have been able to receive her distribution outright, free of any constraints of the trustee and the trustee's oversight. She would have full control of the money Colorado law mandated she receive as her elective share.

Well, after doing the math, Sally decided not to elect. She received a greater amount under her husband's trust than she would have received by exercising her right to the elective share. But she had to accept the restrictions the trust placed on her access to her inheritance.

It is important for spouses to do the "math" to see if accepting the decedent's estate plan is the most beneficial way to proceed. Just know there are options and a spouse's decision will take some careful thought.

5.5 THE PRE-MARITAL AGREEMENT

Colorado has adopted the Uniform Premarital and Marital Agreements Act (C.R.S. § 14-2-301). In essence, this law allows a couple to set out in writing, prior to their marriage, the rights and obligations of the parties upon death and in the event they divorce.

Why is this important? A premarital agreement may contain provisions that impact the inheritance rights of a surviving spouse. A premarital agreement may dictate the terms of the administration of a decedent's probate estate, trust administration, or certain non-probate transfers, such as retirement accounts, joint tenancy assets, and life insurance.

The rub comes when there is a premarital agreement that may say one thing, such as the surviving spouse shall have the right to continue living in the family residence after the other spouse's death, while the decedent's will provided the family residence is to be distributed to his children from an earlier marriage. What rights, to live in the residence, would the surviving spouse have?

These are the types of issues that can arise and will have to be addressed in the administration of an estate.

✦ **Really Important Point:** Where there is a surviving spouse, do not forget to ask if there is premarital agreement. If there is a premarital agreement, its impact on the estate could be significant. Premarital agreements are most often used in second or third marriages, but they could also be used in a first marriage.

5.6 THE BLENDED FAMILY

Planning for individuals in a second marriage or those with a blended family is very difficult. We discuss this in Chapters 7 & 8 of our companion book, *Estate Planning: The Basics and Beyond - Why There Is No Such Thing as a Simple Will.* To review this book take a look on our website for a copy.

Probate administration issues can also be challenging with decedents who die in the context of a second marriage and/or a blended family. Emotions often run high in estates involving a second marriage and children from the first marriage. This is because the couple often leaves their combined estate to the survivor of them, with the children as the contingent beneficiaries.

Without proper estate planning, the children of the first spouse to die can get disinherited because the surviving spouse is often free to change their estate plan providing for all of the surviving spouse's combined assets are to be distributed solely to the survivor's heirs, with nothing being distributed to the children of the first souse to die. While most spouses may not have such a plan in mind during marriage, they can be influenced by their own children after the loss of their spouse.

✦ **Really Important Point:** As the personal representative, it is important to understand this emotional minefield and the consequences of poor planning. Heirs can be very cranky when they discover they have become partially or totally disinherited.

5.7 THE EXEMPT PROPERTY AND FAMILY ALLOWANCE

If a decedent dies leaving a spouse and children, there are statutory rights available to the spouse and children giving them priority rights to certain assets in the estate. These statutory provisions are referred to as the exempt property allowance and the family allowance.

C.R.S. § 15-11-403 provides for exempt property as follows: "*the decedent's surviving spouse is entitled to exempt property from the estate in the form of cash in the amount of or other property of the estate in the value of twenty-six thousand dollars in excess of security interests therein*."

In 2023 the Exempt Property allowance amount is $40,000. The Exempt Property amount is adjusted for inflation annually from the original statutory amount.

Additionally, Colorado law at C.R.S. § 15-11-404, provides for a family allowance for the spouse and the children as follows:

"*In addition to the right to exempt property, the decedent's surviving spouse and minor children who the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments*."

These statutory provisions are extremely helpful where ongoing support is needed for the decedent's family and also for assisting the surviving spouse to secure certain meaningful assets in the estate.

CHAPTER 6

FREQUENTLY ASKED QUESTIONS

In this Chapter we will answer many of the questions asked of our office when we meet with clients who seek assistance in administering a decedent's estate. We hope this helps you understand the process more completely.

6.1 WHAT IS THE COST OF ADMINISTERING AN ESTATE?

There are potentially many costs to consider when administering an estate. The costs depend in large part upon the nature of the assets held by the estate. First, you have the ongoing costs to maintain the estate assets. For example, there are costs associated with maintaining investment accounts, such as advisor fees until the accounts are distributed. If a residence is part of the estate, there are costs associated with maintaining the property, such as taxes, utilities, and maintenance costs. Tax returns may need to be filed and accountings need to be made, and this may require the work of an accountant. If real estate is listed for sale, a realtor commission of 6% of the sale price is usually charged upon the sale of the real property. Additionally, there are usually closing costs, which can amount to another 1-2% of the cost of sale. There can also be "estate sale" costs when the personal property and household goods in an estate are liquidated.

Legal costs may also be incurred. Most law firms will charge a fee based on the time expended in helping with the administration. The fee is normally an hourly rate, as

opposed to a flat fee. The hourly rate will depend upon the experience of the professional involved and the type of legal work required. Sometimes a legal assistant (paralegal) is involved in administering the estate and the hourly rate of the legal assistant is charged, which is typically lower than the rate of the supervising attorney. If the lawyer spends time on the matter, the fee at the lawyer's hourly rate will be charged. The practice of our firm is to delegate work to a legal assistant, provided it is within their area of expertise, in order to reduce the overall cost of the administration.

As a general rule, we advise our clients the legal fee cost of administering an estate can be somewhere between $3,000 to $10,000 for most of the estate administrations for which we are hired to provide assistance. There are some administrations where the cost is less than $3,000, and in other cases the costs can exceed $10,000. That will depend in large part on the complexity of the estate assets.

The ultimate fee will depend upon numerous variables. In taxable estates (over $13,990,000 in 2025) the need to coordinate appraisals and file estate tax returns tends to increase the cost of administering the estate.

If a fight breaks out among the beneficiaries in the estate, then the costs to administer the estate may increase dramatically. Estate conflicts can delay the administration of the estate and require substantial legal work to reach a resolution of the issues causing the fight. Where conflict exists, it often requires the court to intervene, as well as having the parties participate in extended negotiations and sometimes mediation and trial.

An appraisal of estate assets is a common occurrence when various assets are distributed to different beneficiaries or for purposes of establishing a date of death valuation and the cost basis in the asset. Under current law, a beneficiary in the estate will receive a new basis in any estate asset distributed to the beneficiary. The beneficiary, therefore, will want an appraisal to establish the value and the new basis of the asset. This will be important if the asset is later sold. Appraisals will usually cost money.

So, much of the legal cost in an administration depends upon the nature of the decedent's assets and the willingness of the beneficiaries to cooperate in the administration. Also, the experience and expertise of the named personal representative and/or trustee can also drive the eventual cost of the administration. An inexperienced personal representative or trustee can make quite a mess of an estate that counsel may have to tend to later.

The bottom line is each estate administration is different. It can require expensive administration, but it does not have to. There are many variables to consider in estimating the ultimate expense of administration.

6.2 DOES THE PERSONAL REPRESENTATIVE OR TRUSTEE GET COMPENSATED FOR THEIR TIME AND EXPENSES?

"Yes" is the short answer. The personal representative and/or the trustee should keep an accurate account of the time they spend. He or she is typically entitled to receive reasonable compensation for the work they do on behalf of the estate.

What is reasonable? It really depends on the nature of the work being undertaken. Cleaning out a residence could be compensated at one rate, which could differ from the rate to be paid for filing complicated income tax returns for the decedent.

Arriving at a reasonable fee can sometimes create conflict among the beneficiaries. It is often helpful if the compensation is worked out in advance with the heirs. If agreement cannot be reached, the personal representative can ask a court to determine what is reasonable and what should be paid. Of course, getting a court to approve a reasonable fee will itself likely generate a legal fee. This expense should be weighed by the parties before proceeding to court to resolve the issue.

The payment of a personal representative's fee is income. Since it is income, it will likely need to be reported on the recipient's income tax return.

Receiving payment for a fiduciary is not mandatory. Many personal representatives and trustees choose to waive taking a fee.

6.3 HOW DIFFICULT AND TIME CONSUMING IS THE PROCESS?

The obvious answer is: It depends. Many estates are very complex, for a variety of reasons, and it can be a full-time job to sort out all the legal, accounting, and distribution issues. Other estates are relatively simple. Sometimes the personal representative has legal counsel do most of the work.

In many ways, acting as a personal representative or trustee in an estate can be a thankless job. It is often unrewarded both financially and emotionally. Be aware of these possibilities.

Also, keep in mind there are professional fiduciaries, primarily trust departments, who will take on the task of administering an estate. Of course, there will be a fee for such a service.

6.4 DO I HAVE TO HAVE AN ACCOUNTANT OR A LAWYER?

You may not need either depending upon your background and willingness to take on the task. Before deciding to go it alone, however, think about this.

First, if you hire someone to help you, the cost is paid by the estate or trust. This tends to spread the cost of the effort, time commitment, and emotional pain over the entire group of beneficiaries. If you take on the job all by yourself, you may be the only one who contributes to the cause in administering the estate.

Second, as in most matters in life, try to do no harm. Be realistic is assessing whether you have the time, experience, and skill set necessary to successfully administer the estate. It is very important for the "do it yourself personal representative" to avoid breaching their duties as personal representatives and making matters worse. Enough said.

6.5 DO I NEED TO KEEP TRACK OF ALL OF THE EXPENSES?

Yes, of course. Expenses of the estate administration are entitled to be reimbursed and may be deductible from the income or estate taxes the estate may need to pay.

6.6 WHAT ABOUT INCOME TAXES?

The estate of the decedent potentially will have to pay an income tax on income earned by the estate. There will also likely be a “final” personal income tax return for the decedent that will need to be filed. We highly recommend seeking professional help with this, as the post-death tax obligations can be complex.

CHAPTER 7
WRAP UP

We hope you now know more about the administration of an estate than you did when you started reading this book. Administering an estate is not as easy as it may seem, however, in many cases it does go quite simply.

You may have heard how awful "probate" can be and how you should do anything humanly possible to avoid it. This is definitely an exaggeration. Colorado has a modern and efficient probate process. If someone tells you about a "nightmare probate," it was probably because someone died without well-written estate planning documents, or the heirs were fighting with one another.

Probate can be challenging, but it does not have to be. Relying on professional help goes a long way to relieving the personal representative of his or her anxiety. Remember, the real angst in administering any estate can come from many different sources.

There can be a contest by the heirs. It may be challenging just to find the assets subject to the administration. Stress may come from difficult and demanding heirs. Paying income taxes and perhaps estate taxes may give you angst. Then there are the many issues that can arise in administrations involving blended families.

I need go no further as the complexities can be overwhelming. So, it is time to wrap up this book. Remember, this book is not a substitute for sound legal,

accounting, and other professional advice. It is intended to give you some initial direction when you may feel you are lost at sea.

We wish you well on the estate administration journey!

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Baird has over 50 years of experience in family wealth preservation, focusing his practice on tax, estate planning and administration, long term care and special needs planning. He graduated from the University of Colorado with a Bachelor of Arts degree in Economics in 1972 and received his law degree from Willamette University in 1975. He founded the law firm of Brown & Brown, P.C. and has practiced in the Western Slope since 1975.

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Baird also has been a guest speaker at various legal continuing education events periodically throughout the United States.

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Clara has been an author of the Estate Planning chapter in the Senior Law Handbook published by CLE/Colorado Bar Association. She has given presentations and lectures throughout the State on topics involving trust and estate planning, estate administration and elder law.

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Shauna gives presentations and seminars at legal continuing education events and community programs in Grand Junction.

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