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PERSONAL REPRESENTATIVES

The purpose of this memorandum is to summarize the process of administering a decedent's estate, and the duties of the personal representative in that process. Please remember, however, that this is a summary only. It cannot cover every possible issue that might arise in connection with the administration of a particular estate.

A personal representative is charged with administering the estate. In general, that involves collecting and valuing the decedent's assets, paying valid debts, expenses of administration, and taxes, and then distributing the remaining assets to the appropriate beneficiaries.

1. Opening the Estate

The first step in the probate process is opening the estate and securing the appointment of the personal representative. In an "informal" proceeding (without hearings scheduled before the judge), an Application for Informal Probate and certain other documents are filed (usually electronically) with the District Court of the county in which the decedent was domiciled (the Denver Probate Court

for Denver). If there are no problems, then the personal representative is usually appointed within a few days after filing the documents. The Court clerk issues "Letters" that are evidence of the personal representative's authority to act on behalf of the estate.

2. Information of Appointment

Within 30 days after the appointment of a personal representative, a copy of an "Information of Appointment" must be sent to each heir and beneficiary under the Will. The Information of Appointment provides notice to the heirs and devisees that a personal representative has been appointed. Copies are sent to all of the "interested persons" and the original is filed with the Court.

3. Notice to Creditors

A newspaper notice must be published to notify claimants of the decedent's death, and that a probate administration has been commenced. This notice also limits the period during which claimants may file claims. The Notice to Creditors is published in a paper of "general circulation" in the county of the decedent's domicile.

Claims can be "presented" to the estate either by filing them with the Court, or by delivery to the personal representative, within four months after the first publication of notice to creditors. However, known claimants may file claims until one year after the date of death, unless actual notice of a shorter period is sent to them. Claims need not be on a special legal form. Generally, a regular bill or other statement for services will suffice as a legal claim.

A personal representative has a duty to pay all proper claims promptly. If the estate does not have enough assets to pay claims, Colorado law provides a list of the priority of certain claims. Claims will start to accrue interest if they are not paid within sixty days following the time period for presenting the claim. If the personal representative decides that a particular claim should not be paid, a copy of a Notice of Disallowance should be sent to the claimant, and the original must be filed with the Court. The claimant will then have sixty days in which to file a Petition for Allowance. If the petition is filed, the matter will be set for hearing. If the petition is not filed, the claim will be barred.

A personal representative must decide whether to be paid a fee by the estate for his or her work as personal representative. If so, the personal representative will have to keep accurate records of the time spent on estate matters, and designate a reasonable hourly rate. The fee will be income to the personal representative and deductible by the estate.

The personal representative should also consider notifying the credit reporting agencies of the decedent's death, to avoid identity theft problems. Contact information for the three agencies: Equifax, Inc, P.O. Box 740241, Atlanta, GA 30374, 1-800-685-1111, or at <http://www.equifax.com>; Experian, P.O. Box 2002, Allen, TX 75013, 1-888-397-3742, or at <http://www.experian.com>.; and TransUnion, P.O. Box 2000, Chester, PA 19022, 1-800-916-8800, or at <http://www.transunion.com>.

4. Inventory and Asset Information

A personal representative must assemble, collect, and value all of the estate assets, and prepare an Inventory of the assets that were in the decedent's name alone (not in joint tenancy, with a beneficiary designation under a contract, or in a trust). The Inventory is due within three months after the appointment as personal representative. Once completed, the Inventory may either be filed with the Court or delivered to each interested party that requests one.

The personal representative has a duty to protect and conserve estate assets. Estate funds must be properly invested, at least in interest-bearing accounts. Property and casualty insurance must be in place for real property and vehicles, and estate property must be protected from theft as well as is reasonably possible. The personal representative must be careful not to commingle estate assets with any joint tenancy assets, the separate property of a beneficiary, or the personal representative's own assets.

The following is a list of the type of asset information needed to prepare an Inventory.

- a. Deeds to real property, and any leases, together with appraisals as of the date of death. Also, information on any mortgages existing on the property, and the principal balance as of the date of death. An ownership and encumbrances report should be obtained from a title company on any real property.
- b. Bank statements for all accounts. A request should be sent to the banks for date of death balances, including accrued interest, and the exact manner in which each account was titled.
- c. Stock and bond certificates, including savings bonds. The securities must be valued as of the date of death.
- d. Statements from investment accounts. Again, the securities must be valued as of the date of death.
- e. Partnership agreements. A valuation of the partnership interest must be obtained, and the provisions in the agreement must be reviewed, concerning the death of a partner.
- f. Promissory notes payable to the decedent. The principal balance remaining as of the date of death must be determined. If the note is secured by a deed of trust, generally the personal representative must assign the deed of trust to the appropriate beneficiary.
- g. Insurance policies on the decedent's life, or owned by the decedent, or a Form 712 for each policy (issued by the insurance company, but it must be specifically requested).
- h. Income tax returns for the past several years to be sure that all income-producing assets have been listed.

- i. Car titles, with a description of the vehicle. Automobiles are usually valued vehicles with the N.A.D.A. used car guide (blue book).
- j. List of household furnishings with estimated value, or appraised value of particularly valuable items.
- k. Divorce separation agreement, if any, or marital agreement.
- l. Any other asset information.

After all claims and taxes are paid, the assets must be distributed to the proper beneficiaries.

5. Accounting and Financial Records

A personal representative must maintain complete records of all cash and investment transactions of the estate. Other beneficiaries have the right to information concerning the estate, to assure themselves that the personal representative is properly discharging his or her duties. An estate checking account should be opened in the name of the estate, and all receipts and disbursements should be run through that account. The check register should contain complete and detailed information about each transaction. The check register can then be used to prepare the Accountings for the estate, and to assist with the preparation of income tax returns, as discussed below.

6. Ancillary Probate

If the decedent owned any real property in his own name in states other than Colorado, probate proceedings may be necessary in those states to transfer title.

7. Non-Probate Assets

The above discussion mainly concerned the "probate" estate. Assets administered in the probate estate by the personal representative are all assets titled in the decedent's name alone. Joint tenancy assets, annuities, retirement accounts, trust assets and life insurance benefits are generally not probate assets. However, such assets must be reported on the federal and Colorado estate tax returns, if such returns are necessary.

Joint assets become the property of the surviving joint tenant automatically. Generally, you only need to give a certified copy of the death certificate to the entity in possession of the asset and the transfer of title will occur. This should not be done immediately if the surviving joint tenant wants to consider disclaiming any assets, as discussed below.

Claim forms for life insurance proceeds and annuities can be filed by the designated beneficiaries. If life insurance proceeds are payable to the estate, they are probate assets.

Retirement accounts are also usually payable to a designated beneficiary, and are not probate assets. Because of the income tax consequences of payment of proceeds from individual retirement

accounts (IRAs), qualified pension plans, and tax-deferred annuities, please carefully consider the options available before filing claims for these proceeds. In addition, if the decedent was already receiving minimum required distributions from retirement accounts, then the distribution for the final year may still need to be paid. Be sure to check with the account custodians to determine if the distribution was made before the date of death. A surviving spouse as beneficiary has several options to consider, such as whether to roll them over into his or her own IRA, start receiving benefits, have them paid in a lump sum, or disclaim some portion to minimize estate taxes in the spouse's estate.

8. Estate Taxes

In 2010, the federal estate tax "does not apply." For decedents dying in 2009, the federal estate tax exemption was \$3.5 million. If Congress does not act, the federal exemption will be \$1 million in 2011. If the value of all property in the decedent's name, joint assets, life insurance owned by the decedent, etc., exceeds the federal estate tax exemption, a federal estate tax return must be filed within nine months after the date of death.

In order to prepare that return, a complete list of all assets will be needed, together with information supporting the valuations as of the date of death. Appraisals must be obtained for all real estate, date of death balances must be obtained for bank accounts and investment accounts, and stocks must be valued as of date of death. Particularly valuable household items and collections should also be separately listed and appraised.

Property in an estate may also be reported at its value six months after the date of death, if the total value has decreased. Appraisers should be asked after the six month period whether the value has gone down. Any securities should be re-valued as of that date. The "alternate valuation date" is the *earlier* of six months after date of death, *or the date of disposition of the asset*. If an asset has been sold or distributed, the date of disposition is the alternate valuation date.

You should keep in mind that the basis of property owned by the decedent for purposes of computing gain on sale of the property by the estate or a beneficiary is generally "stepped up" to its value on the date of death, or six months after, if that is the value used on the estate tax return. This "step up in basis" does not apply to income-type assets, such as retirement accounts and tax-deferred annuities.

In 2010 when the federal estate tax does not apply, there is only a limited basis increase: \$1.3 million to be allocated by the personal representative among assets passing from the decedent to beneficiaries, plus an additional \$3 million to be allocated to assets passing to the surviving spouse or a QTIP trust.

9. Inheritance Taxes

If the decedent owned any real property in states other than Colorado, inheritance tax returns may be necessary in those states. As of 2005, Colorado no longer had an estate or inheritance tax, but about half the states do have such taxes, and many states have lower exemptions than the federal

exemption. Titling property in the name of a revocable trust generally avoids *probate proceedings* in the other state, but not state estate or inheritance taxes. If Congress does not take any action on the federal estate tax, the “state death tax credit” will be revived in 2011, which will result in the return of Colorado’s estate tax.

10. Income Tax Returns

a. Final Individual Return.

The decedent’s final federal and Colorado income tax returns, covering income received and deductible expenses paid during the period beginning on January 1 of the year of death, and ending on the date of death, must be prepared and filed, and any tax due must be paid. A surviving spouse can report such income and deductions on his or her income tax return and file jointly for the year of death. If the surviving spouse has a dependent child at home, he or she may be able to file using joint tax rates for the next two years. The personal representative must be careful to divide the income received and deductions paid before the date of death from income received and deductions paid after the date of death.

b. Estate Income Tax Returns.

The estate is a separate taxpayer for income tax purposes. A taxpayer identification number must be obtained from the Internal Revenue Service, and the Notice of Fiduciary Relationship (IRS Form 56) must be filed. A federal income tax return (Form 1041) reporting income received by the estate will be required in all years in which the estate's gross income exceeds \$600, or there is any taxable income. A Colorado fiduciary income tax return (Form 105) will generally be required in all years in which a federal income tax return is required to be filed.

The estate may file its income tax returns on the basis of a fiscal year. The estate's first fiscal year begins on the date of death, and will end at the end of any month selected by the personal representative, provided that the first fiscal year does not exceed one year from the date of death. The fiscal year is selected by filing a *timely* income tax return for the first year, using that fiscal year. Excess deductions carry out to the beneficiaries only in the estate’s final year.

c. Trust Income Tax Returns.

A revocable trust becomes irrevocable and a separate taxpayer at the decedent’s death. Trusts are generally required to file income tax returns based on the calendar year. However, the Internal Revenue Code permits a revocable trust to be treated as part of the estate for income tax purposes for a period of time after death. This would mean that the trust's income and deductions would initially be combined with the estate's for income tax filings. Both the trustee of the trust and the personal representative of the estate must elect to have the trust treated as part of the estate by the due date for filing the first income tax return for the estate. You should discuss this election with your accountant prior to filing the first returns.

11. Accountings and Closing the Estate

After all known debts, administration expenses, and taxes have been paid or provided for, the personal representative should prepare a Final Accounting. The Accounting is a statement of all cash receipts and disbursements of the estate. If a complete and detailed check register has been maintained for the estate's checking account, and all transactions have been run through that account, preparation of the Accounting will essentially involve transferring information from the check register to the appropriate Accounting form.

If the personal representative closes the estate informally (without Court review of the administration), then the Inventory and Final Accounting will be provided to interested parties, but neither must be filed with the Court. A Verified Statement is then filed with the Court stating that everything in the administration of the estate has been completed. If no matters are pending one year after filing the Verified Statement, the personal representative's appointment will be terminated.

Alternatively, the personal representative can decide to close the estate "formally." In a formal closing, the Final Accounting must be filed with the Court, and a Petition will be filed to request approval of the Accounting and the proposed Schedule of Distribution. Notice must be given to all interested parties, and a hearing date obtained from the Court clerk. If no objections are raised, usually no one need actually attend the hearing. The personal representative will be discharged from his or her duties as personal representative after the Judge signs the Order and all assets are distributed as listed on the Schedule of Distribution.

12. Disclaimers

If any beneficiary does not want to receive distribution of certain property from an estate, or nonprobate assets such as life insurance benefits, retirement benefits, or joint tenancy property, then a disclaimer should be timely signed and filed with the appropriate entity. A disclaimer must be executed before the property has been received by the beneficiary. It also must be executed within nine months following the date of death. Usually, disclaimers are executed to minimize estate taxes, or to avoid increasing assets available to creditors. If assets are disclaimed, they generally pass as if the beneficiary had not survived the decedent. You should consider such disclaimers as early in the administration of the estate as possible before benefits are received by the beneficiaries.

13. Surviving Spouse's Elective Share

Under Colorado law, a surviving spouse has the right to elect to take a portion of the augmented estate (as defined by law) instead of, or in addition to, the gifts that are provided under the Will. An election to take such share must be filed with the court within the later of nine months after the date of death, or six months after the Will, if any, is admitted to probate. This right may be waived in a valid marital agreement or waiver.

14. Allowances and Homestead Exemption

Under Colorado law a surviving spouse is entitled to a family allowance of \$24,000, although this amount can be adjusted by the court based upon his or her financial needs. A surviving spouse is also entitled to exempt property up to a value of \$26,000. These amounts, if claimed within the earlier of one year after the date of death or six months after first publication of notice to creditors, have priority over the payment of any creditors or bequests under the Will, and they must be paid first. They do not have priority, however, over administration expenses of the estate or funeral expenses. The surviving spouse is also entitled to a homestead exemption of \$60,000, and if the decedent was at least age 60, the exemption is \$90,000. This means that the decedent's creditors cannot reach the equity in his or her residence except to the extent the value of the equity exceeds the exemption. Of course, this does not prohibit the enforcement of a lien against the property, such as the payment of a mortgage.

The administration of a decedent's estate is obviously an important process. It clears the title to the decedent's property. It settles legitimate debts and wipes out others. It may establish a new income tax basis for the property in the estate. Following the proper administration procedures protects the personal representative in making distribution of the property to the beneficiaries.



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