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GENERAL DUTIES OF 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 (for the City and County of Denver, the Denver Probate Court). 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 “interested persons” and the original is filed with the Court.

Under Colorado’s Designated Beneficiary Agreement procedure effective July 1, 2009, unmarried individuals may designate each other as beneficiaries in an agreement recorded with the clerk and recorder in the county in which one of the individuals resides. One of the options in such an agreement is to designate each other as an “heir.” Because an *Information of Appointment* must be sent to the decedent’s heirs even if there is a Will, it must be determined if a *Designated Beneficiary Agreement* was recorded in Colorado for an unmarried decedent.

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.

The 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 of the 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, and to invest prudently. The personal representative must see that estate funds are properly invested, at least in interest-bearing accounts. The personal representative must also see that property and casualty insurance is in place for real property and that estate property is 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 to request 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 or LLC agreements. A valuation of any partnership or LLC interests must be determined, and the agreement reviewed for provisions concerning the death of a partner or member.

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 of that asset.

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. Annuity policies. The beneficiary must be determined, as well as the value as of the date of death, the taxable income component of the proceeds, and the options available to the beneficiary.

i. Income tax returns for the past several years for the decedent to be sure that all income-producing assets have been listed.

j. Car titles, with a description of the vehicle. Vehicles are usually valued with the N.A.D.A. used car guide (blue book).

k. List of household furnishings with estimated value, or appraised value of particularly valuable items.

- l. Divorce separation agreement, if any, or marital agreement.
- m. 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, including timeshares or oil and gas interests, 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, “pay on death” assets, annuities, retirement accounts, trust assets and life insurance benefits are generally not probate assets. However, such assets must be reported on the federal estate tax return, if such return is necessary.

Joint assets become the property of the surviving joint tenant automatically. Generally, the personal representative only needs to give a certified copy of the death certificate to the entity in possession of the asset and the transfer of title will occur. A *Supplemental Affidavit* must also be recorded for Colorado real property. This should not be done immediately if the surviving joint tenant wants to consider disclaiming any assets, as discussed below. In addition, assets payable on death to a named beneficiary also pass to that beneficiary usually upon providing a certified copy of the death certificate, and a claim form.

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 custodian to determine if the distribution was made before the date of death. If the surviving spouse is named as beneficiary, the spouse has several options to consider, such as whether to roll them over into an 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

If the value of all property in the decedent's name, joint assets, life insurance owned by the decedent, etc. exceeds the federal exemption (\$5,000,000 as indexed for inflation), a federal estate tax return must be filed within nine months after the date of death. The tax rate is 40% of the net estate over the exemption. Even if the total value does not exceed the federal exemption, it may be advisable for the surviving spouse to file an estate tax return to increase his or her gift and estate tax exemption (the so-called “portability” of the deceased spouse’s unused exemption)

In order to prepare the federal return, a complete list of all assets, together with information supporting the valuations as of the date of death, must be assembled. 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.

The personal representative 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” (or down) to its value on his 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.

9. Inheritance Taxes

If the decedent owned any real property in states other than Colorado, inheritance tax returns may be necessary in those states. Since 2005, Colorado no longer has an estate or inheritance tax. This is because the federal “state death tax credit” that Colorado used to receive was changed to a deduction on the federal return.

10. Income Tax Returns

a. Final Individual Return.

The decedent’s final federal and Colorado income tax returns, for 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 the spouse’s income tax return and file jointly for the year of death. If the surviving spouse has a dependent child at home, the spouse 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. If a refund is due on the final federal return and it is not filed by a surviving spouse, the personal representative must file a *Form 1310* with the *Form 1040* so that the refund will be payable to the estate or beneficiary, and not to the decedent.

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. On the *final* return for the estate, excess administration expenses and losses may be carried out to the beneficiaries to report on their personal *Form 1040*. However, keep in mind that *only* administration expenses attributable to taxable income are deducted. If the estate invests solely in tax exempt bonds, those excess deductions will not be carried out to the beneficiaries.

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. The personal representative should discuss this election with the 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 Closing Statement is filed with the Court in which the personal representative states that everything in the administration of the estate has been completed. If no matters are pending one year after filing the Closing 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 non-probate 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. Such disclaimers should be considered 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, the 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 \$30,000, although this amount can be adjusted by the court based upon the spouse's financial needs. A surviving spouse is also entitled to exempt property up to a value of \$30,000. These amounts, if claimed within the earlier of (1) one year after the date of death, or (2) 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 deceased spouse is at least age 60, the exemption is \$90,000. This means that the decedent's creditors cannot reach the equity in the decedent's 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 proper beneficiaries.



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