

PROBATE

(Colorado Resident)

(Dated Material – January 1, 2013)

1. WHAT IS PROBATE?

Probate is a court procedure for the purpose of transferring assets that are not otherwise AUTOMATICALLY transferred. For example, assets that are **not** subject to probate are those owned in joint tenancy, life insurance that names beneficiaries, retirement accounts that name beneficiaries, pay-on-death bank accounts that name beneficiaries, and any other property that is **automatically** transferred to another. A Will does not automatically transfer assets.

Having a Will does not avoid probate. Only where the property owner made advance arrangements with a bank, life insurance company, stock broker or other company as to who will own the asset on his/her death, can probate be avoided.

For example, if a person has an account at a Bank but has not designated a joint owner, or owner on death, the Bank does not know who is entitled to the money when that owner dies. The Bank requires us to obtain court authorization to transfer the money to the person who inherits the money. Our Wills designate who will inherit our assets. If we do not have a Will, state law decides who inherits.

The probate court is where we send our Wills on our death, or where we find out who is to inherit our property if we have no Will. Once the probate court validates our Will, it also designates the person (called a personal representative or executor) who will do the necessary work (our Will can name this person, who is usually a close relative, friend, or trust company/bank).

NOTE: If there is no real estate, and if the total value of the assets in the name of the deceased are \$63,000 or less, then those assets can be transferred WITHOUT probate. The person inheriting the assets would use a form called "COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT PURSUANT TO §15-12-1201, C.R.S."

2. SIMPLIFIED PROBATE

Great strides have been taken in the last several years to simplify, and make less expensive, the probate process. This is especially true for estates that are not complicated and are not contested by relatives or creditors. Often it is not even necessary to go to court - literally everything can be handled by mail or electronic e-filing. With simplified probate, no judge reviews the file, and no court approvals are needed to carry on the probate, such as selling assets or making distributions to heirs. This simplified process is usually called "informal and unsupervised" probate. When necessary, more formal

court proceedings are still available, such as where the Will was not properly signed or witnessed, someone was disinherited, there is a disputed creditor's claim, or other reasons why we need a judge to become involved.

3. WHAT ARE THE STEPS IN A PROBATE?

- a. **Application** – The person who seeks to be appointed as the personal representative of the Estate fills out this form, then files it with the court in the county where the deceased lived;
- b. **Will** - if there is a Will, and Codicils, the originals are filed with the Application;
- c. **Bond** - a guarantee of performance backed up by an insurance company. A Will normally does NOT require a bond. If there is no Will, a bond may be required;
- d. **Acceptance of Appointment** - the proposed personal representative signs this form agreeing to perform the duties;
- e. **Admission of Will and Appointment of Personal Representative** – If informal probate, the court registrar will sign this form. If formal probate, the judge signs it.
- f. **Letters Testamentary** - the Court registrar (usually the court clerk - not the judge), signs this document that appoints the personal representative (Letters Testamentary if there is a Will, or Letters of Administration if there is no Will);
- g. **Notice of Appointment** – copies of the Appointment and Will (if there is one) are sent to all interested persons such as close relatives (spouse, children, siblings, etc.);
- h. **Bank Account** - the personal representative opens a bank account in the name of the Estate in order to collect money and pay bills (the personal representative does not use his/her own money);
- i. **Creditor's Notice** - A notice is published in a local newspaper for three weeks advising creditors to file claims by a certain date for any bills that the deceased owed to them;
- j. **Gathering Assets and Paying Debts** - The personal representative takes control of all assets and pays proper debts, including filing the deceased's final income tax returns;
- k. **Inventory** - Within three months after being appointed, the personal representative prepares and files with the court an inventory of assets, and mails copies to the interested persons;
- l. **Distribution Documents** - After waiting at least six months after being appointed, the personal representative prepares papers to distribute the assets that are left over after payment of taxes, bills, expenses and debts. The forms usually used for this purpose are **Bills of Sale** for personal property and **Deeds** for real estate. The beneficiaries of the estate sign **Receipts** for what they inherit, and **Releases** the personal representative from liability;
- m. **Accounting** – The personal representative prepares and sends to the heirs an accounting of all money and assets collected, and paid out from the Estate;
- n. **Schedule of Distribution** – This shows who is inheriting assets and how much. It is sent with the Final Accounting.
- o. **Closing Statement** – No earlier than six months after being appointed, the personal representative files with the court a form stating that everything has been done to process the estate and that it can be closed;

- p. **Federal Estate Tax Return** - If the value of the assets is greater than the Federal Estate Tax Credit equivalent (\$5,250,000 if death occurred in 2013), a Federal Estate Tax Return must be filed, any taxes paid, and releases obtained. This tax return will delay the closing of the Estate.

4. **WHAT ARE THE COSTS?**

Costs vary from state to state, and even from county to county. Costs also vary depending on the type and extent of assets, debts, persons or charities inheriting, and other variables. Thus, it is impossible in this report to give accurate estimates of the cost. However, some general information may be helpful:

- a. **Attorney** - An attorney will normally charge based on his/her time (charging an hourly rate), plus out of pocket expenses. The attorney's job is to advise the personal representative and assist in preparing and filing the forms mentioned above. Although neither Colorado nor Arizona have established fees by law, California is one state that has statutory fees related to a percentage of the estate. For a truly simple estate that does not involve filing of federal/state estate tax returns, nor selling real estate, no disagreements between heirs as to who gets what from the estate, and where the personal representative is able to gather assets, pay debts and distribute the estate to the heirs with only minimal involvement of the attorney, fees in such a SIMPLE estate may be from \$2,500 to \$3,000, plus costs and expenses. Of course the more work the attorney is asked to do - the higher the fees will be. Much depends on the size of the estate, the form of assets (cash, real estate, stocks and bonds, promissory notes, unpaid debts, number of heirs, what the Will says, etc.). Some assets cause more work than others to manage and distribute. An attorney should provide an itemized billing each month listing the work done, time spent and expenses. Most attorneys will delay collection of fees until the personal representative has collected funds belonging to the deceased and is able to pay estate expenses from estate assets;
- b. **Costs** - The court charges a fee of approximately \$150. The Notice to Creditors published in the newspaper may cost \$100. If any appraisals are needed for tax purposes, determining a sale price, or establishing the stepped-up basis for assets such as real estate, this will usually run approximately \$350 for each parcel of residential property, and more for acreage and commercial property. Of course these costs will differ depending on where the probate is being conducted, if there is commercial real estate or business involved, and the needs of the particular estate.
- c. **Personal Representative/Executor** - While this person is entitled to a fair fee for time spent, and reimbursement for expenses, many persons in a very simple estate do not charge a fee. However, where there are several heirs, or other complicating activities, an hourly rate of \$25-\$30 is normally acceptable. If the personal representative is a professional person (an accountant, CPA, attorney, bank or trust company) the fees will be higher to reflect the

expertise brought by the person in handling the estate. A personal representative is not expected to use his or her own funds to pay estate expenses. Such fees collected by the personal representative are income subject to federal and state income taxes.

5. HOW LONG DOES IT TAKE?

An estate can be opened as soon as just a few days after the death. Normally it takes 10 to 14 days to gather the information, find and review the Will and other important papers, identify the heirs, spouse, children, possibly grandchildren, and other interested persons, obtain current addresses, prepare court papers, etc.

If there is no estate tax to deal with, an estate can be closed as soon as, but not before, six months after being first opened. If a federal estate tax return must be filed (within nine months after the death), this will delay closing the estate until the IRS has issued a release. This can cause the estate to stay open for up to two years (depending on whether the IRS wants to audit the tax return before issuing a release).

Some assets (normally cash) can be distributed before the estate is closed - as long as there remain sufficient assets in the estate to pay creditors and other probate costs. The law provides that a surviving spouse and underage children can be paid certain sums for their needs while the probate is pending. Often, in a small estate, there will have been assets owned by the deceased and the surviving spouse as JOINT TENANTS, or life insurance payable directly to a surviving spouse or child. These joint tenancy assets can be used by the surviving person immediately after the death of the deceased (these assets are not part of the probate).

6. IS IT WORTHWHILE TO AVOID PROBATE?

This is a very difficult question to answer with generalities. For some people, simple actions can be done to avoid probate (such as joint ownership, pay-on-death accounts, etc.). For others, setting up such accounts can cause more problems and expenses than a simple probate (for example, some widows or widowers will put their child's name on their assets not thinking that their child's divorce, bankruptcy, death, incapacity, or refusal to cooperate could jeopardize those assets - as where the parent needs to sell the asset or refinance a loan to generate money for living expenses). And having children as joint tenants makes it confusing to figure out if the asset is an extra inheritance for the child or is to be shared with other children.

Setting up a living, or revocable, trust may be the answer. Discussions with a knowledgeable estate planning attorney is the only accurate way to find out what is right for you. (Most attorneys do not charge for the first consultation. They will suggest a plan that is tailored to you - sometime for a flat fee if the planning is basic.)

Keep in mind that there are many activities that must be undertaken whether or not there is a probate. For example, even if there is no probate, someone still has to take care of income taxes; pay debts; collect, manage, sell and distribute real estate and other assets that are not to be given directly to the heirs; and possibly file a federal estate tax return. Trying to avoid a simplified probate may not save much money – and, if the wrong thing is done to avoid probate, could ultimately cost your family much more. If an estate could be handled by a simplified probate, this may be the best procedure to follow.

MESSAGE: This Information Sheet is intended to provide general information only. It is not intended to cover all of the legal issues that arise in each situation. It is suggested that none of the activities described above be done without first talking to an attorney who is knowledgeable about such matters. This material is dated and the enclosed information may change because of new laws, regulations, or other impacts.

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