

The  
COLORADO GUIDE  
to  
**PROBATE**



Including a Discussion  
about  
What to Do First  
and  
How to Deal with  
Taxes, Creditors, Vehicles,  
Safe Deposit Boxes  
and  
Disputes



**THE HUGHES LAW FIRM**

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## When a Death Occurs

- 1) Who to call first:
  - A. If death occurs in a nursing home or hospital, the mortuary
  - B. If death occurs at home under hospice care, call the hospice nurse
  - C. If death occurs at home, call the coroner or mortuary
  - D. If death is unexpected or accidental, call 911
- 2) The mortuary is notified and brings the deceased into their care.
- 3) Funeral director collects vital statistics for the death certificate.
- 4) Discussion with the responsible parties regarding last wishes.
  - A. Viewing or visitation? Family members only or others permitted?
  - B. Memorial services?
  - C. Disposition of the remains?
    - Traditional Burial?
    - Traditional Entombment?
    - Cremation?
      - Scattering of remains?
      - Personal retention of remains?
      - Permanent memorialization?
      - Portioning of remains?
      - Launching into space?
      - Incorporating into jewelry?
  - D. Remembrance ceremony?
  - E. Who will preside/participate during any ceremony?
    - Clergy?
    - Family members?
    - Fraternal and civic organizations?
- 5) Items to select (generally driven by type of services selected)
  - A. Casket or alternative container?
  - B. Urn?
  - C. Printed material?
  - D. Markers and headstones?
  - E. Flowers?
  - F. Third party accommodations or cash advances?
    - Newspaper notices?
    - Motorcycle/police escorts?
    - Honorariums?

## **Key Issues**

When settling a decedent's estate, many key issues are lurking below the surface that the lay person may overlook. Legal advice is critical, considering that the personal representative is personally liable for financial mistakes made during the estate - settlement process. Here are a few of the issues that must be addressed in most every estate.

### **The \$64,000 Exempt Property and Family Allowance**

These allowances are available to certain beneficiaries when the decedent dies without a will or with a will that excludes certain required beneficiaries. In small or insolvent estates, these allowances can defeat the claims of creditors and provide the surviving spouse and/or minor children with much-needed financial assistance.

### **Determining Lawful Heirs**

Things can get complicated when there are deceased heirs, disabled heirs, missing heirs or heirs that are under the age of 18. Additional court proceedings – called conservatorships -- may be necessary to make certain assets are distributed to the correct heirs or to representatives of disabled, minor or missing beneficiaries.

### **Determining Creditors**

The probate rules are designed to protect not only beneficiaries, but creditors. There is a hierarchy established in the Colorado Probate Code specifying which creditors have a priority over other creditors. For example, charges made by a personal representative, attorney or funeral home has priority over credit card companies. Debts secured by collateral have a priority over unsecured debts. A personal representative who fails to abide by the rules will be personally responsible for financial mistakes.

### **Taxes**

In Colorado, there is no state or federal death taxes if the decedent's estate is \$5,250,000 or less. Estates in excess of \$5,250,000 are taxed at the rate of 40% on the overage. A Form 706 needs to be prepared and submitted with the tax payment 9 months after date of death. Colorado has no inheritance tax (which is the tax imposed in some states on the actual inheritors of estate assets). Income taxes most always need to be addressed by the personal representative. There are income taxes that must be paid for the last year of the decedent's life (Form 1040). There are income taxes that may need to be paid from the decedent's "estate" (Form 1041). And there may be income taxes that may need to be paid from any trust created by the decedent that survives the decedent's death (Form 1041). Taxes are a mine field for the personal representative to navigate. Legal counsel is always advisable when venturing into this area.

### **Disclaimers**

A disclaimer is a legal tax strategy that may reduce or eliminate numerous problems connected with taxes and creditors. Rather than detail the law of disclaimers here, simply be aware that this topic should be discussed between the personal representative and the estate attorney in most every situation.

## **Resolving Disputes**

Most estates are settled without troubling disputes; however, disputes frequently occur when the personal representative is dealing with a hand-written or outdated will. If disputes cannot be settled amicably among the warring parties, the probate court will do it for them – sometimes to the dismay of all parties involved. The personal representative must be sensitive to all disputes or potential disputes and obtain releases from beneficiaries authorizing the distribution of estate assets before finally closing the estate. Failure to do so may again result in personal liability.

## **Probate**

### **What is Probate?**

Simply stated, probate is the process of proving the validity of the will, paying creditors of the decedent and distributing the decedent's assets to the rightful beneficiaries. Colorado has a simplified, unsupervised probate system; therefore, over 90% of estates in Colorado never see the inside of a courtroom. Court-appointed Personal Representatives do most of the routine administrative tasks such as paying bills, selling assets and distributing personal possessions.

### **What are Probate assets?**

When a person dies, some of the assets will automatically pass by operation of law to certain designated beneficiaries (e.g., by joint tenancy and POD designations). These assets are called non-probate assets. For instance, if a husband and wife have a joint account and the wife dies, the husband gets the funds in the account automatically - regardless of what the will says.

The other major categories of non-probate assets are life insurance and retirement accounts that name a specific person as a beneficiary.

All other assets are called "probate assets." Probate assets do not pass automatically to the rightful beneficiaries; they must be disposed of through probate.

Contrary to popular belief, wills do not avoid probate. They are the documents that are actually probated. If avoiding probate is an estate-planning goal, consider using one of the probate-avoiding techniques discussed above or handling it all through the classic probate-avoidance strategy - the revocable living trust.

### **What must be done to pass probate assets on to heirs?**

After all non-probate assets are determined, the remaining probate assets are generally administered in one of three ways:

1. "**Small Estate Affidavit:**" If the value of probate assets in an estate is \$63,000\* or less, a successor to the decedent can fill out a "Small Estate Affidavit" and present it to the holders of the assets. The persons or institutions holding the assets will then release them to the successor without further action. This works for all assets except real estate - regardless of how little its value.

\*(Y.O.D.) 2013 \$63,000.00, for Y.O.D. 2012 \$61,000.00, Y.O.D. 2011 and 2010 \$60,000.00. This amount is subject to change annually.

2. **Informal Probate**: The vast majority of estates in Colorado are administered informally. Informal administration means the estate is not court supervised. An attorney would have a limited role in these proceedings.

Administration of an estate is commenced by filing special documents with the probate court. While the initial documents may appear uncomplicated, they contain many traps that may complicate an estate settlement later. Anyone attempting to settle a probate estate may find it beneficial to consult with an attorney before getting too deep into the process.

Once the estate is "opened," the personal representative (formerly known as "executor") is responsible for paying the bills and taxes and distributing the remaining probate assets to the beneficiaries. All creditors must be paid in accordance with statutory priority.

Estate administration can take as little as 6 months for a simple estate, or as long as several years in complex cases. Most estates in Colorado are administered in 6 to 12 months.

3. **Formal Probate**: A supervised administration, or formal probate, is needed when there is a dispute among the parties who have an interest in the estate. In cases like these, the Probate Court Judge will resolve disputes and issue orders which all parties must follow.

An estate may be closed informally by filing a document stating that the personal representative has paid all debts and taxes and delivered the property to those entitled to it.

Be aware that Colorado law requires a decedent's will to be filed with the Probate Court within ten days of death, even if there is no need to actually probate the estate.

### **Who is in charge of administering the Probate estate?**

A personal representative represents the decedent's estate. A will almost always names a personal representative. If the will does not name a personal representative, an heir or interested party can ask the court to appoint a personal representative.

## **Taxes**

There are three tax returns that may need to be filed after a person's death.

**Form 1040.** This is the familiar income tax return that most all of us file reporting our income and deductions each year to the IRS. When a person dies, the surviving spouse or the personal representative of the estate must file a final Form 1040 and let the IRS know that there will be no further tax returns filed. Many times two 1040s must be filed for the decedent - one for the year just past and for the year in which the decedent died.

**Form 1041.** This is the income tax return that trusts and estates are required to file each year they are functioning entities. In the eyes of the law, trusts and estates are separate taxpayers; the trustees and personal representatives, respectively, have the legal responsibility to report all income, expenses and deductions that pertain to the entities they represent. In some cases there is interplay among this form, the Form 1040 discussed above and the Form 706 discussed below. Because this interplay can become complicated, it is wise to retain the services of an accountant or an attorney to help in the preparation of all tax forms related a decedent's estate.

**Form 706.** This form is usually required only for estates of decedents who have died with assets in excess of the applicable exclusion amount. The applicable exclusion amount for years 2011 and 2012 is \$5,250,000. For these larger estates, tax Form 706 is due within 9 months from the date of the decedent's death, but can be automatically extended for an additional 6 months. Because this return is the most complicated return of the three discussed herein, it is imperative that you seek the assistance of an accountant or an attorney. Be prepared to provide your advisor with accurate information regarding all of the decedent's assets, liabilities, expenses and deductions. Since the IRS takes 40% of estate values over \$5,250,000, the accurate preparation of Form 706 is critical.

**Note:** Colorado has no inheritance tax; however, some states do. If your family member died in another state or owned property in another state, consideration must be given to the estate and inheritance tax laws of those different states.

### **Safe Deposit Box**

Getting into a safe deposit box is easy as long as you have an experienced bank or credit union employee helping you.

You should visit the bank or credit union armed with the safe deposit box key and death certificate if at all possible. If you can't find the key, you can still gain access, but the bank will charge you a "drilling" fee which can run as much as \$200 and delay access to the box by a day or more.

If you are searching for the decedent's will and/or burial documents, the credit union/bank employee must by law open the safe deposit box to see if a will is inside. If a will is found, the credit union/bank employee will take possession of it and file it with the proper court. The bank employee will make a copy for you.

If there are other assets in the safe deposit box that have an apparent value of \$63,000 or less, the credit union/bank employee will deliver the contents of the box to you upon your presentation of a Small Estate Affidavit (refer to the insert entitled "Small Estate"). If the assets in the safe deposit box appear to be valued at more than \$63,000, the employee will most likely

refuse to deliver the assets to you until you present "Letters Testamentary" or "Letters of Administration" showing that you have been designated as the personal representative for the decedent's estate by prior court order. In other words, a probate of the estate will be required if assets in the safe deposit box exceed \$64,000 in value.

It is not uncommon to encounter resistance from an inexperienced employee when attempting to gain access to a decedent's safe deposit box. If you run into this problem, show the employee the Colorado statute (reverse side of this page) that deals with access to safe deposit boxes and try again to work with the employee as you both study the language of the law. If all else fails, consult with your estate attorney.

## **COLORADO'S SAFE DEPOSIT BOX LAW**

### **C.R.S. 15-10-111. Entry into safe deposit box of decedent.**

*(1) Whenever a decedent at the time of his death was a lessee or owner of a safe deposit box, the custodian shall, prior to notice that a personal representative or special administrator has been appointed, allow access to the box by:*

*(a) A successor of the decedent, if such decedent was the sole lessee or owner of the box, upon presentation of an affidavit made pursuant to section 15-12-1201. For the purpose of delivering the contents of the box in accordance with said section, and an official of the custodian or; if the custodian is an individual, the custodian or his attorney-in-fact shall be present during such entry solely to determine if the box contains an instrument purporting to be the will of the decedent; or*

*(b) A person who is reasonably believed to be an heir at law or devisee of the decedent, or agent or attorney of such person, for the purpose of determining whether the box contains a will of the decedent, deed to a burial plot, or burial instructions. Such entry shall be made in the presence of an official of the custodian or, if the custodian is an individual, in the presence of the custodian or his attorney-in-fact.*

*(2) If an instrument purporting to be a will of the decedent is found in a safe deposit box as a result of an entry pursuant to subsection (1) of this section, the purported will shall be removed therefrom by the custodian or the representative of the custodian and by him shall be mailed by registered or certified mail or delivered in person to the clerk of the district or probate court of the county where the decedent was resident. If there is doubt as to the county of residence of such decedent, the purported will shall be lodged in the office of the clerk of the proper court of the county wherein the safe deposit box is located. If the safe deposit box contains a deed to a burial plot or burial instructions not a part of a purported will, such instruments may be removed by the presumed successor, heir at law, or devisee, or agent or attorney of any such person.*

*(3) After the appointment of a personal representative or special administrator for the decedent, the personal representative or special administrator shall be permitted to enter the safe deposit box upon the same terms and conditions as the decedent was permitted to enter during his lifetime.*

*(4) If at the time of the decedent's death one or more other persons were legally permitted to enter the safe deposit box, their permission to enter shall continue, notwithstanding the death of the decedent.*

## **Small Estates**

Many smaller estates can be settled by family members without the need for a court probate or an attorney – fast, easy & economically!

The secret is the ***Small Estate Affidavit***. If the value of probate assets in an estate is \$64,000 or less, a successor to the decedent can fill out a Small Estate Affidavit and present it to the holders of the assets. The persons or institutions holding the assets will then release them to the successor without further action. This works for all assets except real estate – regardless of how little its value.

You can also transfer title to automobiles, boats, motorcycles, motor homes and other titled vehicles with a specialized affidavit called a “Vehicle Small Estate Affidavit.”

You may also collect out-of-state accounts and deal with out-of-state vehicles with the Small Estate Affidavit, provided the decedent was a resident of Colorado. You may, however, encounter some resistance from employees of out-of-state banks, credit unions and DMVs. If you can't get past it, consult with an estate attorney.

## **Guardianships/Conservatorships**

### **What is a Guardianship?**

A guardianship is a court proceeding where the court appoints an individual or entity to make medical, residential and other personal-care decisions for a disabled person who is not capable of making these decisions for himself. This process is usually not necessary if the disabled person had executed a durable medical power of attorney before his disability.

### **What is the process for appointment of a Guardian?**

A guardianship proceeding is usually initiated by a member of the disabled person's family. The court must be persuaded that the disabled person is unable to make proper decisions for his own care and safety and that the person asking to be appointed as guardian is proper, competent and willing to take on the task. A guardianship can continue for years, but terminates at the death of the disabled person.

### **What is a Conservatorship?**

A conservatorship is a court proceeding where the court appoints an individual or entity to make financial decisions for a disabled person who is not capable of making these decisions for herself. This process is usually not necessary if the disabled person had executed a durable financial power of attorney before her disability.

### **What is the process for appointment of a Conservator?**

A conservatorship proceeding is usually initiated by a member of the disabled person's family. The court must be persuaded that the disabled person is unable to make prudent financial decisions for herself and that the person asking to be appointed as conservator is proper, competent and willing to take on the task. A conservatorship can continue for years, but terminates at the death of the disabled person.

## **Coping with Loss**

### **Time**

Time alone and with others who you trust and who will listen may be the best approach to handling grief. The mortuary and/or your clergy will offer alternatives. Simply ask for help.

### **Rest, Relaxation, Exercise, Nourishment and Diversion**

Consider hot baths, afternoon naps, a trip, and a "cause" to work for or help others. Grief is an emotionally-exhausting process; follow what feels healing to you and what connects you to the people and things you love.

### **Security**

Try to reduce or find help for financial or other stresses in your life. Getting back into a routine can help. Allow yourself to be close to those you trust. Do things at your own pace.

### **Hope**

You may find hope and comfort from those who have experienced a similar loss. Knowing some things that helped them and realizing that they have recovered, may give you hope that sometime in the near future your grief will be less painful.

### **Caring**

Accept expressions of caring from others, even though they may be awkward. Helping a friend or relative also suffering the same loss may bring a feeling of closeness with that person.

### **Goals**

For a while, it may seem that life is without meaning. At times like these, small goals are helpful. Something to look forward to -- like playing tennis next week, a movie, a trip - may help you get through the difficult times. At first, don't be surprised if your enjoyment of these activities is not the same as it used to be. This is normal. As time passes, you may need to work on some long-range goals to give some structure and direction to your life. For the short term, take one day at a time.



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