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PROBATE IN COLORADO

1. What is probate?

Probate is the legal process that is used to transfer title of property from the decedent to his or her devisees (named in the will) or heirs (if there is not a will). All wills and intestate estates must be probated, but the degrees of court involvement and complexity range from simple and inexpensive to complicated and costly.

In Colorado there are three types of probates for both wills and intestate estates—one for small estates (under \$50,000 and no real property), one for uncontested estates (“informal”), and one for contested estates and invalid or questionable wills (“formal”). Both informal and formal probates must be open with the court for at least six months, but full administration of the estate may take much longer.

Whether or not you die having a will, if you have \$50,000 or less and no real property, your devisees or heirs may collect your assets by using an affidavit and not have to involve the court. This procedure requires the devisee or heir collecting the property to swear they are entitled to it and will distribute it to any other entitled devisees or heirs.

The second type of probate, the informal process, is generally allowed when there is a valid will or clear intestacy, no contests are expected, and there is a clearly qualified personal representative ready to be appointed. The court has a limited role in the administration, but ensures that the directions in the will or intestacy law are followed.

A formal probate is required for several reasons, including when a will is contested, unclear, invalid, or when there are apparent or actual significant challenges (i.e., identifying heirs, property title disputes) in administration. The court may require that the personal representative get its approval for every transaction or may allow the personal representative to administer the estate unsupervised.

The information provided in this document is meant for the sole use of Active Duty service members, retirees, their families, and those individuals eligible for legal assistance. The information is general in nature and meant only to provide a brief overview of various legal matters. Rights and responsibility vary widely according to the particular set of circumstances in each case. Laws can vary across states, services, and civilian jurisdictions and laws are changed from time to time. Do not rely upon the general restatements of background information presented here without discussing your specific situation with a legal professional.

2. Will my estate have to go through probate?

All wills and intestate estates must be probated. The probate process has been greatly simplified by the Uniform Probate Code, and more than 90% of probates in Colorado are not court supervised. In addition, the simplified procedure options usually require much less attorney time and the personal representative is able to do most of the routine estate administration tasks unassisted, such as paying bills and selling or distributing personal possessions.

Depending on how your assets are owned, your estate may not have to go through the probate process because your will may not control the distribution of some or all of your assets. There are certain types of assets that are not governed or distributed per the terms of a will. Only property that was owned by you in your individual name (and that does not have a beneficiary designation) is controlled by the will. Assets that are owned in joint tenancy, such as real property or a bank account, or assets that have a beneficiary designation like a life insurance policy or IRA, pass to the beneficiaries by operation of a contract, and are not subject to the provisions in the will or the probate process.

**Note: Colorado law requires that a decedent's will be filed (lodged) with the District Court in which the decedent was domiciled within ten days of the decedent's passing, even if no probate administration is expected.*

3. How do probate assets get passed to the heirs?

As described above, "probate assets" are generally administered in one of three ways: 1) through the use of an affidavit if the total probate estate assets are less than \$50,000 and there is not any real property; 2) through an informal probate procedure; or 3) through a formal probate procedure.

If using an Affidavit for Collection of Personal Property, the affiant goes to the institution or individual holding the decedent's asset, presents the affidavit, and collects the property. The affiant then distributes the property to those entitled to it, whether per the terms of the decedent's will or the intestacy laws.

In an informal and formal probate procedure, the court appoints a personal representative or special administrator who is given the authority to essentially step into the decedent's shoes and wrap up their business affairs and distribute their property. The personal representative may be supervised by the court or conduct the administration without supervision, but is considered a fiduciary for purposes of dealing with the decedent's property.

Colorado requires that a personal representative notify (by publication in a local newspaper or by mail) any possible and known creditors of the decedent, and to pay legitimate claims. During the creditors' period, the personal representative will likely deal with valuing, consolidating, and/or liquidating the estate's assets. After the creditors' period is over, the personal representative may make distributions to creditors, heirs, and/or beneficiaries. An estate can close once all of the assets are transferred out of the decedent's name, all legitimate claims are satisfied, all beneficiary interests are satisfied, and applicable tax returns are filed and paid.

All probate forms, including the Affidavit for Collection of Personal Property, are available from Bradford Publishing, an attorney's office, or on the Colorado Judicial Branch website (www.courts.state.co.us under the "Forms" tab).

4. Who is in charge of administering an estate?

The court will appoint a personal representative (formerly called an “executor”) and issue letters, or a document that evidences the personal representative’s authority to administer a decedent’s estate. The personal representative has many duties, rights, and responsibilities, including the ability to open and maintain an estate bank account; to sell, transfer, or encumber real property; to sell and/or transfer assets; to consolidate bank accounts; and to deal with creditors.

A personal representative has a fiduciary duty to the estate, and has specific duties, including: (1) to deal with the interests of the creditors and beneficiaries impartially; (2) to administer the estate solely with regard to the interest of the creditors and beneficiaries (as opposed to the personal representative’s own interests); (3) the duty of undivided loyalty; and (4) to act prudently.

Other responsibilities of a personal representative include creating an estate inventory of all of the decedent’s assets (real and personal) that includes applicable titling and date-of-death values, managing the estate assets until the court approves the closing of the estate, keep accurate records of the estate’s transactions, and making distributions to creditors, heirs, and/or beneficiaries.

Personal representative is entitled to reasonable compensation for his or her services, and whether or not he or she elects to take a fee for his or her services, the personal representative should keep track of the time they spend working on the administration of the estate.

5. A Word about Fees

An attorney’s expertise is usually necessary in identifying what type of probate is necessary, and the scope of the attorney’s involvement will depend on the complexity of the estate. Even the most well-planned estates and well-written wills have costs associated with administration, including court fees, attorney fees, and the payment of the decedent’s final expenses and legitimate debts. Most attorneys charge an hourly fee, and the rate depends on several factors, such as the attorney’s expertise and experience, the novelty and difficulty of the case, the results obtained, and costs involved.

6. A Word about Revocable Living Trusts

Some advertisements and practitioners send the message that everyone needs a Revocable Living Trust and that it will help you avoid probate. A Revocable Living Trust may help you avoid probate if all of your assets are titled properly and the document is drafted properly, but it is not guaranteed and there are still costs associated with the administration of a trust. If you think you’ve been a victim of fraud in the sale of a Revocable Living Trust, call the Colorado Attorney General’s Consumer Protection Unit at (303) 866-5189.

This pamphlet is published as a public service by the Colorado Bar Association. Its purpose is to inform citizens of their legal rights and obligations and to provide information regarding the legal profession and how it may best serve the community. Changes may have occurred in the law since the time of publication. Before relying on this information, consult an attorney about your individual case. This pamphlet, as well as other helpful information, can be found at <http://cobar.org>