

## SO NOW YOU ARE A PERSONAL REPRESENTATIVE

We hope this brochure will give you a general idea about what being a personal representative means and what the duties and responsibilities are.

A person named to administer an estate used to be called an executor or executrix. Now the term is personal representative, regardless of whether that person is named in a will or is appointed because there was no will.

A personal representative carries out the wishes of the decedent regarding distribution of his/her assets, and to complete the decedent’s business, such as paying bills and filing tax returns.

Administering an estate is much simpler than years ago, when “going through probate” was time consuming and complicated. Most Colorado estates can be taken care of in approximately one year. In a simple estate, for example, where not much money is passed from husband to wife or there is only one beneficiary, you may not need an attorney. In most other estates, you will want some advice and help. Some wills, particularly older ones, may name an attorney to help with the estate. You need not hire that attorney, though there are often good reasons to do so. Generally, you should choose an attorney who specializes in “trusts and estates.”

### Your Duties in General

You have a duty to act impartially in regards to all parties to the estate. You have to treat each person the same. You have a duty to administer the estate with care and prudence (there are legal definitions about what this means), making sure to put the interests of the estate in front of your own interests in the estate. As the personal representative, you are responsible for doing the following:

- Collecting and inventorying the assets of the estate
- Managing the assets of the estate during the probate process
- Paying the bills of the estate
- Making distribution to the heirs or beneficiaries of the estate
- Closing the estate after all of the above responsibilities have been completed

### Prior to Appointment as Personal Representative

If you are nominated as personal representative in a will, you have the power, before you are appointed by the court, to carry out written instructions of the deceased relating to the body, funeral, and burial arrangements. You may begin to protect and safeguard the deceased’s assets. Do not remove or distribute assets before opening the estate.

### Search for the Will

The original will is usually in a safe place in the deceased’s home, a safe deposit box, or in an attorney’s office. It is also possible the will was lodged with the court for safekeeping during the deceased’s lifetime. When the original signed will is found, lodge it within 10 days with the probate court in the county where the deceased lived. If you are only able to find a copy of the signed will, it may be possible to offer it to probate. However, the signed original will is preferable. If a will cannot be found, an attorney can help guide you through the intestate probate process. Also look

for a handwritten list of instructions, a letter to family or other similar documents. In Colorado, these documents may constitute a will.

### Entry into the Safe Deposit Box

Any person whose name is on the box may enter it at any time. An heir or beneficiary in a will can ask the bank to search for the will, a deed to a burial plot, or burial instructions. A representative of the bank will open the box in the presence of the heir or beneficiary and remove any will that is found. The bank will deliver it to the court by certified mail, registered mail or hand delivery, but consider asking for a copy of the will before they do. After the will is filed with the court, the personal representative named in the will can file a petition or application with the court to appoint her or him.

### Search for Other Documents

The personal representative is the court representative who has the authority to search for any important documents. The search should include the home, office, place of business, and any safe deposit boxes. Meeting with advisors such as accountants, investment professionals, insurance agents, and attorneys is advised. Any information indicating that an asset exists or that bills are unpaid should be kept for use in the administration of the estate. ***Items to look for:***

- Funeral and burial plans
- Safe deposit rental agreements and keys
- Trust agreements
- Nuptial agreements
- Life insurance policies or statements
- Pension, IRA, or retirement statements
- Recent income tax returns for past several years
- Gift tax returns
- Marriage, birth, and death certificates
- Divorce papers
- Military records and discharge papers
- Certificates of deposit, bank statements, checkbooks, and check registers
- Notes receivable and payable
- Motor vehicle titles
- Deeds, deeds of trust, mortgages, leases, and title policies
- Stock and bond certificates and account statements
- Bankruptcy filings
- Partnership, LLC, or corporate agreements
- Unpaid bills
- Health insurance papers
- Papers regarding fraternal organizations or professional societies (because they may offer benefits upon the death of their member).

### Opening and Closing— Informal vs. Formal?

In Colorado, we have a flexible system of estate administration. Generally, you can choose how you will open and close the estate and the extent of court supervision over your activities as a personal representative. There are two types of probate: informal and formal probate. You should

consult your attorney to determine which type of probate is best for you. ***Informal probate*** happens when there is an uncontested will or if there was no will, all of the potential heirs of the estate agree on who should be personal representative and who the beneficiaries of the estate are. Filing an application for an informal probate usually is less expensive and takes less time than formal probate. This is true because there is less court involvement. There is no advance notice to parties and no binding orders from the court.

***Formal probate*** applies if the heirs and/or beneficiaries cannot agree on issues and they need the Court to decide for them. Formal probate is also necessary if the original will cannot be found. Formal proceedings will result in final and binding court orders and involve notice being sent to interested persons (beneficiaries, creditors, etc) about actions to be taken. Formal proceedings may also be used to settle a dispute, such as if family members disagree over who should be the personal representative.

Sometimes estates are opened informally, but closed formally, so as to get the protection of a court order for the personal representative that everything has been done correctly.

### Creditors

Following a death, certain creditors may be very aggressive. An important purpose of the probate administration is to provide an orderly process for dealing with all of a decedent’s creditors. Try to avoid depleting the available cash on the first “squeaky wheels” because it can cause bigger problems later in the estate administration, as well as expose the personal representative to a charge that he or she showed preference for a specific creditor over others.

### Your Authority and Specific Duties

You will be issued “letters” from the court, which say that you have been appointed personal representative. These letters are evidence that you have authority to act on behalf of the estate. You will need to show or send them to various third parties, such as banks, insurance companies, etc., when you are administering the estate.

**Promptly after your appointment as personal representative, you should:**

- Prepare a Notice of Appointment form (which is probably in the packet of forms you got) and send this to all those interested in the estate (such as beneficiaries and unpaid creditors) and file proof with the court that this notice was sent. This notice form must be sent to all interested persons within 30 days of appointment to let them know the facts and ground rules regarding administration of the estate, including your name and address, and the court in which the papers are on file.
- Set up an estate accounting system at the beginning of administration of the estate. For your protection, keep records of all cash and other financial transactions of the estate and provide

written accountings to the beneficiaries. This is very important and often not done correctly. In a supervised administration or with a formal closing, the accounting forms are filed with the court. This information will also be required for tax purposes.

- Prepare a written inventory within three months, to include the estate assets on a court-approved form. If you decide to close formally, the inventory must be filed with the court. Otherwise, just give a copy to interested persons. Maintain all documentation to support the values reported in the inventory.

### Paying the Bills:

Send a notice to known creditors such as credit card companies, physicians, banks, etc. that the person has died and you are the personal representative.

- Ensure proper bills are collected and paid.
- Publish another notice in the newspaper for unknown creditors. Once the notice to creditors is published, if creditors don’t send you a bill within four months after first publication, the claim should be forever barred. If you don’t publish a notice, the time for unknown creditors to make a claim against the estate is extended to a year from the date of the decedent’s death.
- A claim may be given to you or filed with the court. No specific form is required. A bill that comes in the mail is a properly presented claim (but don’t pay bills that are only presented orally). If you disagree with the claim, you have 60 days to tell the claimant in writing. They then have 60 days to begin proceedings to enforce the claim.

It’s a good idea not to pay any claims until you’ve determined what they all are, and until you’ve reached the end of the time in which someone can make claims.

### Paying the Family:

While the estate is being administered, the Colorado Probate Code authorizes a “family allowance” of \$24,000 for a surviving spouse and/or minor children. This amount can be changed by the court at the request of an interested person. The Code also provides for a \$26,000 allowance (in addition to the \$24,000) to the surviving spouse that is generally exempt from creditors of the estate. When the family is entitled to these allowances, they are made before creditors are paid.

The Colorado Probate Code provides that a spouse is not completely “disinherited” from an estate. A child born or adopted after the will and omitted from a will generally has a right to share in the probate estate. If there is a dispute about this, you shouldn’t make any distributions until this is worked out. Provisions about this are technical and should be discussed with a lawyer.

### Notification:

To put others on notice of your authority, re-register the

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decedent's assets in the name of the estate with you listed as personal representative (you will use your letters of appointment as evidence of your authority).

For registered stocks and bonds, submit your letters of appointment to the transfer agent, along with the securities and an affidavit of domicile, which you get from a broker or a bank. If you need to sell some securities to raise money for estate expenses, you can do so without having the securities registered first, although it usually takes longer to get the proceeds. Bearer bonds need not be re-registered.

When you sell or distribute any real estate, you will need to use your letters of appointment.

Since the administrative period is relatively short in Colorado, you won't need to establish a long-range investment plan. The estate needs to have sufficient cash to pay bills, taxes, and expenses, but you don't need to convert everything to cash to divide it. Assets such as real estate owned by the decedent can be retained, if they're not speculative in nature and as long as there is proper diversity among the estate's investments.

The investment standard you will be held to, as a personal representative under Colorado law, is called "The Prudent Investor Rule." It emphasizes that you manage the assets intelligently and carefully, as the assets of another, with an eye toward permanent disposition of funds.

## **Paying Taxes:**

You will need to address both the decedent's and the estate's taxes. This always includes filing a final income tax return for the decedent even if the decedent paid no income taxes in recent years. You may have to file a separate income tax return for the estate if the estate is taxable.

You also may have to file federal and Colorado estate tax returns if the estate is big enough to require it. In 2011 and 2012, the total value of all assets must exceed \$5,000,000.00 to be taxable and this amount is scheduled to vary in years to come. Note that for estate tax purposes, the decedent's estate includes non-probate assets such as joint tenancy assets, life insurance, 401(k) and IRA plans, and assets held in trust. Federal estate tax returns are very complicated, and are due nine months from the date of death. If it appears that the total of all the decedent's assets approaches \$5,000,000.00, you should see an attorney who specializes in trusts and estates.

When a person dies, his taxable year ends on the date of his death, and his income and deductions are reported through that date. If the decedent was married when he died, the estate can join with the surviving spouse in filing a joint income tax return for the year in which the decedent died. You may be able to take certain deductions on the decedent's final income tax return or claim them as an expense of administration on the federal estate tax return. You may want to talk to an attorney or an accountant about these decisions. The estate is a separate tax-paying entity, and you must get a separate

tax identification number from the IRS. File a request for this number through the district director of the IRS on form SS-4. You will need this number to open estate bank accounts as well as to transfer securities into the name of the estate if they are to be held for any period of time. The tax return used to pay income taxes for the estate is called a fiduciary income tax return. For the IRS, it's form 1041; for the Colorado Department of Revenue, it's form 104:1. These forms must be filed if the estate has any taxable income or has gross income of \$600 or more in any taxable year. You may use either the calendar year or fiscal year as the "taxable year." Which one you choose will have various financial implications, and you should discuss this with an attorney or accountant.

Estate income tax returns must be filed on or before the 15th day of the fourth month following the close of the taxable year (April 15th if you use the calendar year). You must pay the entire tax due. After the second year, you must file income tax estimates and make quarterly estimated tax payments.

## **Paying yourself:**

You may choose to be compensated for your duties as personal representative. Your compensation and that of your attorney is subject to a "reasonableness test" under the Colorado Probate Code. Family members often serve without pay, except for out-of-pocket expenses. If you do this, consider filing a fee waiver with the court. If you take compensation, you must keep a detailed record of tasks performed and the time spent. Your compensation will be taxable as ordinary income.

The assets of the estate belong ultimately to the beneficiaries and not to you. Make distributions to beneficiaries as soon as it can be done safely.

Generally, estate assets are paid in this order: those held by the decedent as a fiduciary, such as if the decedent was serving as a trustee of a trust at the time of death; family allowances; expenses of administration; funeral costs; debts and taxes under federal law; amounts expended by Colorado under Medicaid; expense of last illness; debts and taxes under state law; bills; specific gifts under a will; beneficiaries under a will, or heirs, when there is no will.

Distribution doesn't have to wait until the estate is closed. You can make payments as priority is determined. Even partial distributions may be made to beneficiaries during administration. (In the rare cases where administration is supervised, distribution may be made only following a court hearing and order.) But remember, as personal representative, you are responsible if you distribute assets and then find you need the assets to pay legitimate claims.

## **Closing the estate:**

The estate does not terminate automatically. You may elect to close informally or formally.

In informal closings, a closing statement form is filed with the court indicating that the estate has been fully administered. This limits the time to one year when those who receive assets and creditors can challenge your administration and distribution of the estate.

In formal closings, the administration and proposed distribution of the estate is approved by the court and the personal representative is immediately discharged or released from liability by court order. A formal closing usually does not require an actual hearing before a judge.

The Colorado Probate Code is intended to speed up the process of administration of estates. Since Colorado has no separate inheritance tax, many smaller estates may be administered and distributed following the end of the credit period (usually within six to twelve months). In such estates, the majority of estate assets may often be distributed before closing. Larger estates often involve filing estate tax returns and may not be closed until accounts are settled with the taxing authorities. However, if the tax and probate aspects are handled in an organized way, and there are no complicated assets, like family businesses, the great majority of larger taxable estates can be closed within two years.

## **Potential Liability as Personal Representative**

As the personal representative you may be liable to the beneficiaries for any loss to the estate and for any gain the estate should have realized but did not. The list below identifies some potential ways a personal representative can incur liability. You should contact an attorney and seek their advice as to any potential problems that may arise. Situations in which a personal representative may be found liable include:

- Failure for any reason to exercise reasonable care and skill in managing the property of another
- You negligently or intentionally did something you should not have done, such as steal funds from the estate, or fail to follow the will or commit other actions that breach your fiduciary duty as personal representative
- You negligently or intentionally failed to do something you should have done, such as properly inventorying the assets, or failing to pay the heirs or beneficiaries of the estate.
- You are liable to the beneficiaries for any loss to the estate and for any gain the estate should have realized but did not, if that loss cannot be shown to have been a reasonable risk, taking into account the term of the investment.

As personal representative, you're responsible for managing the estate until it is distributed. What you can and cannot do may be specified in the will or by Colorado's probate code.

Once you're appointed, you have full authority and control over the assets the decedent owned in his name alone or as a co-tenant with others. Property held in joint tenancy with right of survivorship is not a probate asset, nor are proceeds of life insurance that are payable to a named beneficiary other than the estate.

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