



## How a Death Affects a Transaction

November 2004

**Probate** is the process of submitting the will of a decedent to the court, getting the will approved, and administering the decedent's estate. In cases where there is no will (an intestate estate) the term refers to the entire process of administering the decedent's estate. The decedent's estate is defined as all the property owned by the decedent at the time of death that does not pass automatically by operation of law.

Probate proceedings are governed by the Colorado Revised Statutes (CRS Articles 10 through 17, Title 15). These statutes took effect July 1, 1974, and simplified the probate system in Colorado.

### Testate and Intestate

The decedent's estate may be classified as either testate or intestate.

An estate is classified as testate if the person died leaving a will. The will is a written document by which a person officially provides for the distribution of his/her property upon death.

The will does not take effect until the death of the testator and is not valid and cannot be relied upon until it has been probated. The heirs of the decedent are determined by the will. In Colorado, handwritten wills are recognized but must be proved to be totally in the testator's (decedent's) handwriting. Verbal wills are not recognized in Colorado.

An estate is classified as intestate if the decedent left no will at the time of death. The heirs are determined by descent and distribution under the statute as follows:

- If there is a surviving spouse and no surviving children, the entire estate goes to the surviving spouse under CRS 15-11-102.
- If there are surviving children and a surviving spouse, see distribution under Shares of Spouse under 15-11-102 CRS and Shares of Heirs other than Surviving Spouse under CRS 15-11-103.
- If there is no surviving spouse but there are surviving children, see distribution under Shares of Heirs other than Surviving Spouse under CRS 15-11-103. Also see CRS 15-11-107, 15-11-108, 15-11-113, and 15-11-114.
- If there is no surviving spouse and there are no surviving children, the estate passes to the parents of the decedent under CRS 15-11-106.
- If there are no surviving parents, the estate passes to the siblings of decedent under CRS 15-11-106.

### New Contract Update: Obtaining HOA Documents

Upon request, Land Title is still obtaining the current financials, bylaws, rules, and regulations directly from the HOA management companies. We automatically send copies of the covenants with the title commitment.

We are requesting the meeting minutes but cannot always obtain them. When we have received the minutes, there is almost always a charge—sometimes as high as \$50. (Most HOA companies are now charging for all copies of documents.)

Since the contract states that the seller is to provide and pay for these documents, we will charge the sellers on their settlement statement automatically, unless we hear otherwise from you as the Realtor.

We are also recommending that Realtors try to get the recent minutes from the seller, as we are meeting with some resistance when we try to obtain these.

- If there are no siblings of the decedent, the estate goes to lineal descendants (uncles, aunts, cousins, etc.) under CRS 15-11-106.
- If there are no lineal descendants, the estate passes to the State of Colorado under CRS 15-11-105.

### Joint Tenancy and Tenants in Common

If the decedent owned property in joint tenancy with his or her spouse, the property automatically passes to the surviving spouse.

If the decedent held property as tenants in common with others, his or her interest in the property will pass to heirs, either as stipulated in the will or by descent if there is no will. Estates held as tenants in common must be probated.

### Types of Proceedings

The attorney representing the estate of the decedent has several alternatives in administering the estate.

**Informal Procedure in Opening an Estate:** The attorney may choose to open the estate through informal proceedings. The attorney submits the probate application to the Registrar of the Court (Probate Court in the City and County of Denver and district courts in all other counties) and if

Corporate Office  
3033 East First Avenue  
Suite 600  
Denver, CO 80206  
303-321-1880  
Fax 303-331-0272

Please visit our website  
for a complete list of  
office locations:  
[www.LTGC.com](http://www.LTGC.com)

approved, no court proceedings are necessary. This procedure is used when there are no problems anticipated with the estate. In general, informal proceedings are less expensive and less lengthy than formal proceedings.

**Formal Procedure in Opening an Estate:** The attorney may open the estate through formal or judicial proceedings. After giving notice to all interested parties, the attorney petitions the court seeking to open the estate. Formal proceedings are chosen over informal based on the complexity of administration, value of the estate, and the likelihood of trust, cooperation, and agreement of interested parties. Formal is usually chosen over informal when there is a likelihood that the validity of a will may be disputed.

In informal and formal proceedings, a personal representative is appointed to administer the affairs of the estate. The personal representative is appointed or selected pursuant to the will, where the decedent has nominated a specific individual to act. In the event the decedent has not specifically nominated an individual, the court provides guidance for the appointment of the personal representative. Additionally, all powers-of-attorney become void upon the death of the principal.

The personal representative may sell, transfer, convey, mortgage, encumber, exchange, or otherwise dispose of the estate's assets, real or personal, for the benefit of interested parties. The probate code also provides protection to any purchaser dealing in good faith and for value with the personal representative.

**Unsupervised Administration:** In unsupervised administration, the personal representative has an expansive list of general powers that can be exercised at the personal representative's discretion. In the administration of any estate, the personal representative owes a fiduciary duty to the creditors and interested parties. (Self dealing is voidable).

**Supervised Administration:** In supervised administration, the personal representative has a list of general powers that may be exercised without court order. The court may, however, place restrictions on the personal representative. It is advisable to obtain an order to sell property under a supervised administration.

The personal representative notifies the decedent's creditors by publication in the legal newspaper for the county where the estate has been probated. Creditors have four months from the date of first publication or one year from the date of death of the decedent to file a claim. After that they are barred from taking action.

### Marketable title

Marketable title to the decedent's real estate is transferred by recording both of the following:

1. The certified Letters of Appointment of the Personal Representative, which must meet the following criteria:

- The letters should be current (issued preferably within the last six months).
- Name of the decedent must appear on the letters in the same manner as title was held. If there is a variation, amended letters must be obtained from the court. (A Supplemental Affidavit may not be used in this situation).
- Letters will be checked for any limitations of powers.

2. The Personal Representative's Deed, which includes:

- the name of the personal representative;
- the name of the decedent, which must match the letters, and any a.k.a.'s;
- the date of the will and the date the will was admitted to probate (or an indication that the decedent died intestate and the date of death);
- the probate number; and
- the date of appointment of the personal representative.

These documents are prepared by the attorney for the estate; they cannot be prepared by the title insurance company. The documents are recorded in the county where the real property is located.

The probate code provides that a personal representative's deed may be voidable (can be set aside) if it is considered to be self dealing. This may occur if the deed is to any of the following:

- the personal representative;
- the personal representative's spouse;
- an agent or attorney for the personal representative;
- any corporation or trust in which the personal representative has a beneficial interest; or
- any transaction which is affected by a conflict of interest on the part of the personal representative.

The deed is considered voidable for a period of three years after the decedent's death or one year after distribution of the estate, whichever is later. A transaction with a "voidable" person or entity cannot be contested:

- by a person who has consented to the sale as evidenced by written document or deed;
- if the will authorized the transaction;
- if the decedent was bound by contract; or
- if an order by the court approving the transaction is obtained from the court if the property is to be conveyed or encumbered.

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Corporate Office  
3033 East First Avenue  
Suite 600  
Denver, CO 80206  
303-321-1880  
Fax 303-331-0272

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for a complete list of  
office locations:  
[www.LTGC.com](http://www.LTGC.com)

