



Primer on Probate and Real Estate in Colorado

What is Probate?

Probate is the legal process used to transfer the title of assets from a person who has died to his or her devisees (named in a Will - also known as a Last Will and Testament), or heirs (if there was not a Will). Wills are a document in which a person specifies the method to be applied in the management and distribution of his or her estate after his death (testate estate). All testate estates must be probated. If a person dies without a Will (intestate estate), then intestate succession results which is the method of asset distribution as determined by state law. An intestate estate must also be probated. In Colorado, there are three (3) types of probate:

1. Small Estates (approx. \$60,000 and no real property)
 - Do not have to open a probate action through the court
2. Uncontested Estates (the informal process)
 - Valid Will, no contests expected, qualified personal representative ready to act, limited court involvement
3. Contested Estates (the formal process)
 - Will is contested, unclear, or invalid, court supervision may be required for all acts of the personal representative

Formal and Informal probates will be open with the court for at least six (6) months, but final administration will take as long as necessary to administer and close out the estate.

The Estate

Whether or not an asset will need to go through probate will depend on how the asset was owned upon death. Usually only assets that were owned solely by the person that died (individually and/or provided for no beneficiary designation) are controlled by a Will. For real estate, that ownership is almost always evidenced by a deed. A deed is a written legal instrument which conveys "some" right, title, or interest in real property. Title is defined as the legal evidence of a person's ownership right in that real property. Commonly used deeds in Colorado are: General Warranty deeds, Special Warranty deeds, Bargain & Sale deeds, Quitclaim deeds, and various Confirmation deeds (Personal Representative being an example).

The Personal Representative (formerly The Executor)

The Personal Representative has a fiduciary duty (impartiality, undivided loyalty, act prudently) to The Estate. The Personal Representative will open and maintain bank accounts, sell, transfer, or encumber real estate, and deal with creditors for The Estate. The Personal Representative will create an estate inventory (all real and personal assets), manage the assets and that titling, keep accurate records of all transactions, and make distributions to the creditors, devisees and/or heirs.

When is Probate necessary for Real Estate?

As a general rule, if the real estate involved did not automatically pass to another at death and that real estate needs to be sold or transferred, then probate is required. No Community Property is recognized in Colorado. An Illinois Land Trust is not a recognized in Colorado. Assets that automatically pass to the



joint owner or beneficiaries are done so by the operation of law so are not subject to the provisions of a Will and the corresponding probate process.

The following identifies when probate is necessary and when it is not (in most circumstances) regarding real estate ownership:

- Tenants-in-Common (no right of survivorship) YES
- No Beneficiary Designation was made or is available . . . YES
- Tenancy by the Entirety (probably deemed Tenants-in-Common in Colorado) YES
- Joint Tenancy (with right of survivorship) NO
- Beneficiary Designation (like a life insurance policy, IRA, or 401k) NO
- Trusts (no individual ownership; entity ownership) NO
- LLCs (no individual ownership; entity ownership) NO
- Corporations (no individual ownership; entity ownership) NO
- Partnerships (no individual ownership; entity ownership) NO

Timeshares by deeded interest owned by an individual(s) are the same as all other real estate ownership. Probate is therefore required if no Joint Tenancy exists!

Caution: A lawyer’s expertise is usually required in identifying if probate is necessary and what type of probate may be applicable depending on the complexity of the situation.

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