

Chapter 7 – Estate Planning

Part-1

Probate Transfers of Assets

Probate for the deceased's estate is a process that takes place after your death when your property is distributed, either according to your will or according to the laws of intestacy. During probate, your property is managed by an administrator called a personal representative. Generally, a personal representative handles everything without court involvement. You should appoint a personal representative in your will. If you do not have a will or if your will fails to appoint a personal representative, the court will appoint one for you. Similarly, if you have a minor or disabled adult child and do not have a will or your will fails to appoint a guardian, the court will appoint a guardian for your child. If the court appoints a personal representative or a guardian, the person named may not be the person you would have chosen.

If, at the time of your death, you own real property or if your estate includes personal property valued at more than \$50,000, and if these assets do not pass to another through a survivorship interest, then your will must be probated (or an intestate court proceeding must take place) to pass your property on to your heirs. (See [Chapter 7, Part II](#), on survivorship interests.) The probate process usually takes about six to 12 months and is much simpler and cheaper in Colorado than in many other states. However, probate may take longer, depending on the size and complexity of the estate. Regardless of the size of your estate, you should contact an attorney to discuss estate planning and planning for disability.

Small Estate Affidavit

If your estate does not include solely-owned real estate interests, or more than \$50,000 of personal property that does not pass through survivorship, your assets may be transferred through a small estate affidavit, without any court involvement. See an attorney for more information.

Transfer of Assets Outside Probate Survivorship Interests

Holding property with another under a survivorship interest such as joint tenancy is sometimes used as an inexpensive alternative to a will or trust. A survivorship interest may be applied to both real and personal property. However, there are large pitfalls to this transfer method, both during life and at death, including problems with creditors, taxes and lack of control. Also, a will is still necessary in the event both joint owners die simultaneously. (See [Chapter 7, Part II](#), for more information on survivorship interests and options to joint tenancy such as life estates.)

Payable On Death (POD) & Trustee Accounts

POD and trustee accounts are other alternatives to wills and intestate succession for bank accounts. Such accounts are treated like a normal bank account during the lifetime of the account owner (sometimes called the trustee). On the account owner's death, any funds in the account will be automatically distributed to recipients (the beneficiaries) designated by the account owner. The beneficiaries have no control over the account during the owner's lifetime. Contact your bank if you wish to set up an account in this manner. Before doing so, however, remember that there are pitfalls to this transfer method, just as with survivorship interests.

Securities Registered to Transfer On Death (TOD)

This device for transferring stocks and bonds at death to named beneficiaries works like a POD bank account. It has similar advantages and disadvantages.

Beneficiary Deed

Title to an interest in real property may be transferred on the death of the owner by recording, prior to the owner's death, a beneficiary deed designating a beneficiary. The transfer is effective only on the death of the owner, and owner can revoke or cancel a beneficiary deed by recording a proper revocation prior to the death of the owner.

Trusts

A trust is an arrangement where real or personal property is held by one person, called the trustee, for the care or benefit of another person, the beneficiary. There are basically two types of trusts: testamentary trusts and living trusts. A testamentary trust is set up in your will, and takes effect only after your death and after your estate has been administered. Testamentary trusts, like living trusts, are set up to save estate taxes and to manage assets for minor or disabled adult children. Because testamentary trusts become effective after death, they are useful in situations where asset management is not needed during life.

Living Trusts

A living, or *intervivos*, trust may be revocable or irrevocable, and it may be funded or unfunded. A funded living trust is an alternative to a will and to probate. In a funded living trust, a person (the settlor) puts property and money into his/her trust during his/her lifetime for the benefit of him/her and possibly other family members. An unfunded living trust typically receives assets through a simple pour-over will following the settlor's death.

Most people who are able to handle their own financial affairs usually name themselves as trustee of revocable trusts they set up. The trustee invests the trust assets and makes the assets and income available to the settlor/beneficiary during his or her life. Such a trust is almost always revocable, meaning that the settlor can revoke or amend the trust so long as he or she is able.

If the settlor/beneficiary becomes disabled, alternate trustees are usually named in the trust to assume trustee responsibilities, the most important of which is providing for the financial needs of the disabled settlor/beneficiary. A settlor will usually name a spouse, adult child, relative, friend or a bank as alternate trustees. When the settlor/beneficiary dies, the trust often terminates, and the successor trustee will distribute the trust property to the beneficiaries, as under a will. In many situations, however, living trusts will continue for the benefit of the settlor's spouse and children.

A living trust has several advantages if it is set up properly and fully-funded, meaning all the settlor's assets are placed in trust. First, a fully-funded trust can reduce or eliminate the need for probate upon the death of the settlor. Second, a Colorado resident who owns real property in another state can put that real estate into a living trust and thereby reduce or eliminate the need for probate in the other state. Third, a living trust may avoid the need for a conservatorship for the settlor if he or she becomes legally disabled. However, a living trust cannot avoid a guardianship, because the trustee of a living trust cannot make medical or care decisions for the settlor unless the trustee is the named agent for the settlor under a separate Medical Power of Attorney. (See [Chapter 6](#) for more information on guardianships and Health Care Powers of Attorney.)

Many people think they need a fully-funded living trust so that probate is not necessary when they die. In some states, the probate process is cumbersome and costly, and it is thus desirable to avoid that process. In Colorado, however, probate is relatively simple and avoiding probate is not, by itself, a good reason to have a fully-funded, living trust.

Trusts are complex legal documents that require the use of competent and experienced estate planning attorneys. Preparing and managing the trust can be more expensive in Colorado than a will and probate. If the trust is not drafted correctly, significant harmful tax results may occur. You should not try to create your own trust or purchase a preprinted living trust. Initially, living trusts and wills with testamentary trusts are more expensive to prepare than wills without trusts. However, they may save you many thousands of dollars if you have a complex estate.

Changing Your Will or Living Trust

A will or living trust that meets all of the requirements described earlier is valid until you revoke it.

A will or living trust that is valid in another state is also valid in Colorado. If you change your mind about a particular distribution of your property, or if circumstances force you to otherwise change your will or living trust, you can create a codicil to your will (a document amending your will) or a trust amendment to change your living trust. The codicil or trust amendment must be signed and witnessed with the same formalities as your original will or living trust. While a codicil or trust amendment provides you with a convenient method for making minor changes to your will or living trust, significant modifications may require redrafting the original document. You should never write on your will or living trust after it is executed. Such writing is not legally effective and may invalidate the entire document. Always consult an attorney about how to

change your will or living trust.

Life Insurance

Life insurance proceeds pass to whomever you have named to receive those benefits; that person is the beneficiary. The insurance company will have a record of the beneficiary you chose when you purchased your policy. You also should keep a record of the current beneficiaries of each life insurance policy.

You have the option to change the beneficiary at any time. You must tell your insurance company in writing if you wish to do this. Most insurance companies provide a form to change the beneficiary. It is also wise to name another person as an alternate beneficiary in case your first beneficiary dies before you do. A beneficiary may be the personal representative of your estate (though this can have unfavorable consequences) or trustee of a living trust. All beneficiary designations should be coordinated with your overall estate plan since the insurance company will pay the policy proceeds to the named beneficiary, even if your will says someone else should receive the money.

Estate Taxes

Under current law, no federal or Colorado estate taxes are payable on estates of Colorado residents who have less than \$2 million in total net assets. With proper planning, a husband and wife can transfer up to \$4 million to their children without paying any federal or state estate taxes. Unlike many other states, Colorado has no inheritance tax.

If the combined value of your estate and your spouse's estate exceeds \$2 million, you should consult an estate-planning or tax attorney about planning to avoid estate taxes, which may include creating irrevocable trusts, gifting options, charitable donations, etc. For tax purposes, your estate includes all property in which you have an interest. This includes the proceeds of life insurance policies and retirement benefits, joint tenancy property and certain life estates. (See [Chapter 7, Part II](#), for more information on life estates.) The value of your property for estate tax purposes is the fair market value on the date of your death.

General Advice

Keep an up-to-date, itemized list of all your property and debts. This includes insurance policies, securities, bank accounts, real estate, jewelry and artwork, business interests, pension plans, IRAs and other retirement benefits. You should record where you maintain a safe deposit box and where you keep your original will, trust documents and powers of attorney. You also should list your current financial advisors, your attorney and your accountant. Give a copy of this list to your personal representative, successor, trustee, relative or friend you trust, and to your attorney or financial advisors.

A letter regarding your funeral wishes and any prepaid arrangements should be given to whomever you think will be involved with your funeral.

Glossary Part One

Asset

An item of real or personal property owned by an individual or by an entity, such as a trust.

Beneficiary

Anyone named to receive money or property, such as from a will, a trust, a life insurance policy or a retirement account.

Conservator

The person who has been appointed by the court to manage the financial affairs of a protected person.

Estate

All personal, financial, insurance and real property owned by the individual.

Fully-Funded Living Trust

All of the settlor's assets are placed in a living trust.

Heirs

People who, because of their relationship to the decedent, are entitled to decedent's property if the decedent dies without a will.

Intestate Succession

A process in which Colorado law decides how your property will be distributed if the property is not disposed of through your will.

Irrevocable Trust

A trust which cannot be changed after it is signed.

Living Trust

A type of trust in which one party, the Settlor, during his or her lifetime, creates a trust for himself or herself and/or for others. Property may be transferred to the trust during the lifetime of the Settlor of the trust or after his or her death. Once property is transferred to the trust, it is under the control of a trustee and distributed according to the terms of the trust.

Payable on Death Account (POD Account or a Trustee Account)

A bank account that, upon the account-holder's death, distributes money to the person or people named by the account holder.

Payee(s)

The person(s) named to receive the money from a POD account after the account holder's death.

Personal Property

Property other than real property, such as stocks, bonds, bank accounts, cars, boats, clothing and personal items.

Personal Representative

The person who handles your affairs after your death. This person is either nominated by you in your will or is chosen by a court if you die without a will.

Pour-Over Will

A will that provides that all property administered in probate is distributed to a living trust.

Probate

The legal process by which your property is collected and distributed according to your will or by intestate succession.

Real Property

Land and buildings or structures placed on land, such as houses, commercial buildings and agricultural buildings.

Revocable Trust

A trust that can be amended or changed by the Settlor of the trust.

Settlor

The creator of a trust. Settlers often put money or property into a trust.

Testamentary Trust

A type of trust that is set up in your will. It only takes effect after your death.

Trust

An arrangement in which one person (trustee) holds property for the benefit and use of another (beneficiary).

Trustee

The person who manages and distributes the property held in a trust.

Will

A signed, written legal document that describes how you want your estate to be distributed after you die.