

## Probate and Estate Sales

When a sale of real estate involves the death of an owner(s), there are several components and closing requirements that must be taken into consideration.

### **Joint Tenancy and Tenancy in Common**

If the decedent held title to the real estate in Joint Tenancy with a spouse or other individual, the property will automatically pass to the surviving spouse upon recordation of the death certificate.

This process differs from title held as Tenants In Common where ownership interest is transferred to the heirs of the decedent's estate. This is determined by a will or by descent if there is no will in existence. All real property that was held as Tenants in Common must go through the probate process.

### **What is Probate?**

Probate is the legal process used to transfer title of property from the decedent to his or her devisees as named in the will or heirs, if there is not a will. Estates may be classified as either testate (with a will in existence to be administered) or intestate (no will present), but both types of estates must go through probate. Complexity and court involvement varies based on the type of probate required for the estate.

There are three types of probates in the State of Colorado: one for small estates (under \$50,000 and no real property); informal probate for uncontested estates; and formal probate for contested estates and invalid or questionable wills. Formal procedures may be opened versus informal based upon complexity of the estate, the value, or if there is concern that interested parties may be in disagreement or question the validity of an existing will to be administered.

In formal or informal probate procedures, the court appoints a Personal Representative (PR), formerly known as an executor, who is given general powers to complete business affairs and distribute property on behalf of the decedent. They may act either with or without supervision of the court as determined with their appointment. If there is a will designating this person(s), the court will appoint the PR pursuant to the will. If a will does not specify such person, the court will provide guidance in making the appointment.

The PR is issued "Letters" of appointment from the court evidencing their authority to administer the estate. In many cases, the PR may need to obtain certified copies of those letters to present to creditors, banking institutions, insurance companies, or other various entities. These are provided by the court for a minimal fee. Administration of the estate may take as little as six months, or it may take several years based on the complexity. On average most estates are settled in Colorado in less than 1 year.

Source: The Denver Bar Association. Publication 2010, provided as a public service by the Colorado Bar Association. This information is deemed reliable, but consumers should consult legal counsel as needed about their individual case as changes may have occurred in the law since the time of publication.



## **Closing Requirements to Transfer Title**

In order to transfer marketable title from the decedent's estate, there may be several items identified as requirements to close on a title commitment. These may include recordation of the following in the county in which the property is situated:

- Death certificate or certified copy of the death certificate. It is important to note that if the person held title by a variation of their name from their legal name confirmed on the death certificate, a Supplemental Affidavit may be required to affirm their identity as owner of the real property. This affidavit must be completed by a party with no beneficial interest in the estate.
- Letters of Appointment, Letters Testamentary or a certified copy of such Letters appointing the PR. The Letters must be current, preferably within one year, and the name of the decedent must appear exactly as they held title to the property. If there is any variation between the Letters and how title was vested, amended Letters must be obtained from the court as a Supplemental Affidavit is not sufficient in this case. The Letters will also be reviewed by the closing and/or insuring entity to make sure there are no limitations of powers for the PR.
- Personal Representative's Deed. This type of deed is required to convey property from the estate and must include the name of the PR conveying the property; the name of the decedent as they held title and any a.k.a.'s; the date of the will and date it was admitted to probate OR confirmation that the decedent died intestate along with the date of death; the probate case number; and the date of appointment of the PR. It is preferred but not required that consideration be identified on the deed. A PR's Deed cannot legally be prepared by the title insurance company or closing agent and must be prepared by the attorney or PR.

Estate taxes must also be addressed at closing. In the U.S., the IRS has imposed a tax on the transfer of "taxable estate" of a decedent. A requirement commonly seen on a title commitment is confirmation that estate taxes have been paid in full; there are no estimated estate taxes to be due; or that the title insurer is indemnified for payment of such taxes. There is a tax rate schedule that confirms the amount of exemption based upon the year of death of the individual. In 2009 for example, the first \$3,500,000.00 of an estate was exempt from taxation. In 2010, this has been repealed and there is no estate tax regardless the value. And unless Congress acts prior to 2011, the amount exempt from estate tax will be \$1,000,000.00 in 2011.

## **Contact Your Closing Agent**

Contracts must accurately reflect the estate and PR authorized to convey the property. Reviewing some items early in contract will help to avoid potential delays in closing. For instance:

- 1) Is an owner (as shown on the title commitment) now deceased? If you find this to be true, please notify your closing agent as soon as possible so that they may discuss with you any closing requirements as detailed above.
- 2) Is there one or more PR's named on the Letters of appointment? A copy of the Letters should be provided as soon as possible to the closing agent so they may confirm who is authorized to convey property. If there is more than one PR, all are required to sign closing documents.
- 3) Can a PR designate a Power of Attorney? No, the PR has the fiduciary responsibility to administer the estate.
- 4) Are the Letters of appointment issued by the courts in Colorado? If real property is located in the state of Colorado, Probate must be opened in the State of Colorado through ancillary proceedings.

For more information or forms related to Probate, individuals should consult an attorney, legal counsel, CPA or other professional as necessary. The following resources are also available:

### **Colorado Judicial Branch**

Website: [www.court.state.co.us](http://www.court.state.co.us)

Phone: 303-861-1111 or 800-888-0001

### **Denver Probate Court**

Website: [www.denverprobatecourt.org](http://www.denverprobatecourt.org)

Phone: 720-865-8310

### **Denver Bar Association, publication 2010 "Probate in Colorado"**

Website: [www.denbar.org/index.cfm/ID/20881](http://www.denbar.org/index.cfm/ID/20881)

### **Bradford Publishing**

Website: [www.bradfordpublishing.com](http://www.bradfordpublishing.com)

### **Internal Revenue Service**

Website: [www.irs.gov](http://www.irs.gov)