

Chapter 28

What to Do When Someone Dies: Responsibilities of the Personal Representative and Trustee Under Probate

Aaron L. Evans, Esq.*
Evans Case, LLP

SYNOPSIS

- 28-1. Pronouncement of Death
 - 28-2. What to Do One to Three Days After Death
 - 28-3. What to Do One to Ten Days After Death
 - 28-4. Personal Representative Duties Under the Probate Code
 - 28-5. Trustee Responsibilities
 - 28-6. Resources
-

Dealing with the loss of a loved one is difficult. It is our goal through this chapter to provide you with some important information that may hopefully make the days and weeks after the passing a little easier.

This chapter cannot relate everything you need to know. You should establish a relationship with your attorney early to ensure that all matters and questions are properly addressed. Seeking your attorney's advice before you act may help you avoid more costly legal fees later, and can ensure that you are protected from any liability. Your attorney should be able to provide you with very helpful information and explain the probate process to you.

28-1. Pronouncement of Death

Colorado requires a qualified medical professional to be notified and to make the official pronouncement of death. If your loved one dies at home:

- ▶ Call your physician or local hospital so they can come to certify the cause and approximate time of death.
- ▶ Follow any religious observances that your family member requested.
- ▶ Call family members who may wish to spend private time with your loved one before the mortuary removes the body.
- ▶ Turn off any electrical equipment attached to your loved one's body, but leave any tubes, etc., in place.
- ▶ Call your funeral director. He or she will remove the syringes, catheters, or tubes and transport the body to the mortuary.
- ▶ If it exists, find your family member's final arrangements plan to follow his or her final wishes with respect to whether a funeral, memorial service, cremation, organ donation, or whole body donation was desired. As much as possible, try to follow your loved one's plans. This will relieve you of the burden of making these decisions and will honor his or her last requests.

If your loved one dies in a hospital:

- ▶ The medical staff will assist you with paperwork if the body or organs are to be donated, or if there will be an autopsy performed.
- ▶ The medical staff can make the official pronouncement of death.
- ▶ The medical staff will coordinate with the mortuary or crematory for the arrangements to transport the body.

Call the Coroner or Hospice Provider

If the death occurs at home, you must call the coroner's office for the county in which the death occurs, or dial 911 if you want the support of emergency personnel. Paramedics will attempt resuscitation.

If you are using hospice care, do not contact the coroner's office or 911. Instead, call the hospice provider and they will handle these matters for you.

Notify Family and Friends

Ask family and friends to help you with some tasks, including notification of other family and friends.

The Red Cross will help you notify family members if the deceased was in the military or if the relative to be notified is in the military. The Red Cross will need the following information:

- ▶ Service member's full name;
- ▶ Rank/rating;
- ▶ Branch of service;
- ▶ Social Security number;
- ▶ Military address; and
- ▶ Information about the deployed unit and home base unit (applies to deployed service members only).

Follow the Deceased's Instructions

Look through the deceased's papers to find if he or she:

- ▶ Had a prepaid burial policy;
- ▶ Belonged to a memorial society; or
- ▶ Had written instructions regarding arrangements for burial, cremation, and ceremonies the deceased did or did not want.

Note that these instructions could be legally binding even though they might be contrary to the wishes of others. If you have any questions about whether to follow them, contact a probate attorney or your mortuary.

Make Arrangements for the Deceased Person's Body

Arrange for the body to be picked up according to the coroner's instructions. Your funeral home or crematory will assist with this process.

28-2. What to Do One to Three Days After Death

Complete the Funeral and Burial Arrangements

Ask a trusted friend or family member to accompany you to the mortuary to advise and support you in making the funeral and burial arrangements. You may ask a clergy member to assist you.

Arrangements may include transfer to another location, burial, or cremation. If the deceased was a member of the Funeral Consumer Society of Colorado, you can obtain a lower rate on cremation or funeral services. Contact the Funeral Consumer Society of Colorado at (303) 759-2800. This also could be true for those who shop around. Cremation prices range from about \$900 to \$2,400 or more in the Denver metro area. Those prices should include the cost of the urn and other related services.

Note: Federal law requires price information to be given over the phone. Prices range a great deal, so you may want to compare prices.

If you have concerns that you cannot resolve with the funeral director or the management of the funeral home, contact the Funeral Service Consumer Assistance Program at (800) 662-7666.

Financial Assistance

If the deceased was on public assistance, burial assistance may be available. Contact your local county Department of Social Services as soon as possible and ask for the Burial Assistance Department. There are strict spending limitations, so you must meet with Social Services prior to meeting with the mortuary. Total expenses of burial will be limited to qualify for the benefit.

If the deceased was in the military or is the spouse or dependent child of a person in the military, contact the VA cemetery or VA office. There may be burial benefits. The mortuary will call the VA at your request. Typically, unless the deceased was disabled due to service-related injuries, the only benefit a veteran receives is burial at a national cemetery.

Family Assistance

Choose someone to:

- ▶ Answer the phone calls from family members and friends and collect mail;
- ▶ Care for pets and plants, and tend to other household chores;
- ▶ Assist with lawn care or snow removal;
- ▶ Stay at home during the funeral and visit the home to guard against break-ins occurring when the family is at the funeral; and
- ▶ Prepare food for family and friends after the funeral.

Also, to reduce the likelihood of vandalism to the home or condominium, gather two or three electronic light timers so that lights, a radio, or a TV will go on and off at appropriate times.

28-3. What to Do One to Ten Days After Death

Obtain Death Certificates

The most common and quickest way to obtain death certificates is through the funeral director for a fee. In order to estimate how many to order, you should estimate the number of different assets held by the deceased or institutions that will require a death certificate. Some examples of assets that will require an original death certificate are homes held in joint tenancy, stocks, bonds, and bank accounts.

If you do not order enough, you can get more death certificates later through the Vital Statistics Department for the county in which the death occurred or through the Colorado State Department of Public Health and Environment's Vital Records Office. The cost of a death certificate is \$20 for the first copy and \$13 for each additional copy. Many

people waste money by ordering too many death certificates: six to eight copies are usually adequate. Remember, you can always obtain more death certificates later, if needed.

In General

Contact the following persons or institutions:

- ▶ Police, to inform them that the house of the deceased will be vacant and to request that they occasionally check the house;
- ▶ Probate attorney, to set up a meeting to discuss the probate process, such as how to transfer assets, how to deal with heirs or devisees, and how to report taxes;
- ▶ Accountant or tax preparer, to assist with gathering information as to the deceased's assets owned and to determine what returns should be filed;
- ▶ Banks, to locate accounts and safe deposit boxes;
- ▶ Investment professionals, to obtain information as to assets owned by the deceased;
- ▶ Insurance agents, to discuss insuring the decedent's assets and to obtain necessary death claim forms for life insurance or other assets;
- ▶ Social Security at (800) 772-1213, to stop monthly deposits and learn about benefits;
- ▶ Veterans Affairs, to stop monthly checks and learn about benefits;
- ▶ Agencies providing pension services, to stop monthly checks and obtain claim forms;
- ▶ Guardian, conservator, or agent under a power of attorney, to notify of the death and the end of their responsibilities;
- ▶ Utility companies, to alter or discontinue service;
- ▶ Employer, to notify of death and learn about benefits;
- ▶ Newspapers and magazines, to stop subscriptions (you may consider asking for refunds of the unused portions of the subscriptions); and
- ▶ Post office, to forward mail (if necessary).

Avoid Unscrupulous People

In the period following the loss of a loved one, be careful before accepting any telephone solicitations, and be careful about volunteering personal information about the deceased to strangers over the phone. You may receive fraudulent invoices, so be sure to review invoices carefully for validity. Thieves read death notices and obituaries, so avoid stating the address and other private information about the deceased. Avoid any major lifestyle changes for a period to allow for reflection on how the loss will affect the surviving family and friends.

Veterans Benefits

The mortuary may assist you with the paperwork for VA benefits. For information on VA benefits, call the nearest VA office for benefits information and assistance.

Be prepared to identify the deceased's:

- ▶ Relationship to you;
- ▶ VA claim number;
- ▶ Date of birth;
- ▶ Date of death;
- ▶ Place of death;
- ▶ Surviving spouse or next of kin; and
- ▶ Medical history that bears on whether the death is service-related or not.

If you do not know the deceased's VA claim number, provide the service number and dates of active service.

Veteran's benefits may be available to the surviving spouse. Benefits may include a lump-sum death benefit, if the death was service-related; a continuing monthly payment; financial assistance with funeral expenses and cemetery plot; or burial of the deceased in a national cemetery. Ask for the "Federal Benefits for Veterans and Dependents" publication, or review the VA website at www.va.gov/opa/persona/dependent_survivor.asp for more information about survivor benefits.

Social Security Benefits

For Social Security benefits, call the Social Security Administration immediately at (800) 772-1213. Your call will stop the monthly payments currently being received by the deceased. You must return the funds received for the month of death. If the deceased was receiving benefits by direct deposit (which is most likely the case), excess payments will, in time, be electronically withdrawn from the account.

Social Security monthly benefits are available to the surviving spouse, children under 18, and certain disabled children. Benefits include a one-time death benefit (currently at \$255 for a surviving spouse) if certain requirements are met. Ask for the "Survivors Benefits" brochure or review the Social Security Administration's website at www.ssa.gov for more information about what to do when a beneficiary dies and what benefits may be available.

28-4. Personal Representative Duties Under the Probate Code

Your Duties in General

You have a duty to act impartially in regard to all parties to the estate. You have to treat each person the same. You have a duty to administer the estate with care, making sure to put the interests of the estate in front of your own interests in the estate.

As a personal representative, you are responsible for:

- ▶ 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 distributions to the heirs or beneficiaries of the estate; and
- ▶ Closing the estate after all of the above responsibilities have been completed.

Prior to Appointment as Personal Representative

If you are nominated as the personal representative (also known as “executor”) 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 the deceased’s assets. Do not remove or distribute assets before opening the estate. Brochures are available from the Colorado Bar Association that explain the duties and responsibilities of a personal representative and how a personal representative is appointed when there is no will.

Search for the Will

The original will is usually in a safe place in the deceased’s home, a safe deposit box, or an attorney’s office. It is also possible that the will was lodged with the court for safe-keeping during the lifetime of the deceased. 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 for probate. However, the signed original will is preferred. 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.

Entering 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 the will to the court by certified mail, registered mail, or hand delivery, but first you should ask for a copy. After the will is filed with the court, the nominated personal representative can file a petition or application with the court to appoint him or her.

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;
- ▶ Income tax returns for the past several years;
- ▶ Gift tax returns;
- ▶ Marriage, civil union, 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; and
- ▶ Papers regarding fraternal organizations or professional societies (some of these may offer benefits upon the death of their member).

Informal Versus Formal Probate

There are two types of probate: informal and formal. You should consult your attorney to decide which type of probate is right for your situation.

Informal probate happens when there is an uncontested will or, if there was no will, if 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 informal probate is usually less expensive than formal probate and takes less time. This is true because there is less court involvement. There is no advance notice to parties and no binding order from the court.

Formal probate applies if the heirs and/or beneficiaries cannot agree on all the issues and need the court to decide for them. Formal probate is also necessary if the original will cannot be found. Notice of actions and court proceedings is sent to interested persons (for example, beneficiaries and creditors) in formal probate proceedings, and the court issues final and binding orders.

Your Authority and Specific Duties

You will be issued “letters” from the court to indicate that you have been appointed as the 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 received from the court; send this to all who are interested in the estate, such as beneficiaries and unpaid creditors; and file proof with the court that this notice was sent. The 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 filed.
- ▶ Set up an estate accounting system. This should be done at the beginning of your administration of the estate. For your protection, keep records of all financial transactions of the estate, and provide written accountings to the beneficiaries. This information will also be required for tax purposes. Keeping accounting records is very important and is often done incorrectly. In a supervised administration or with a formal closing, the accounting forms are also filed with the court.
- ▶ Prepare a written inventory within three months to include the estate assets on a court-approved form. If you decide to close the estate formally, the inventory must be filed with the court. Otherwise, you can just give copies to interested parties. Maintain all documentation to support the values reported in the inventory. The value of the assets should be the fair market value as of the date of death.

Potential Liability as Personal Representative

As a 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.

Situations in which a personal representative may be found liable include:

- ▶ You, for any reason, failed to exercise reasonable care and skill in managing the property of another;
- ▶ You negligently or intentionally did something that you *should not* have done, such as took funds from the estate, failed to follow the will, or committed other actions that breached your fiduciary duty as personal representative; or
- ▶ You negligently or intentionally failed to do something that you *should* have done, such as properly inventoried the assets or failed to pay the heirs or beneficiaries of the estate.

This list is not exhaustive. It merely demonstrates some ways a personal representative can potentially incur liability. You should contact a probate attorney and seek his or her advice as to any potential problems that may arise.

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 the deceased's creditors. Try to avoid depleting the available cash on the first "squeaky wheels," because doing so can cause bigger problems later in the estate administration, and it can also expose the personal representative to a charge that he or she showed preference for a specific creditor over others.

28-5. Trustee Responsibilities

Your Duties in General

Once you have been named trustee, co-trustee, or successor trustee of a trust, there are certain duties to perform and rules to follow. Your authority as trustee comes from the trust itself, and your duties and powers should be described in the trust. Read the trust in detail, as it should answer many of your initial questions.

Your three basic duties to the trust and its beneficiaries are:

- 1) A duty of impartiality, not to favor the interest of one party over another;
- 2) A duty of undivided loyalty, not to put your own interest in a conflict with those of the trust; and
- 3) A duty to administer the trust with care and prudence.

You should consult your probate attorney or accountant as to any potential tax filings and other questions you may have regarding your duties as trustee.

Accounting

As trustee, you must set up and keep a set of trustee's books. These records must make a clear distinction between assets you handle as trustee and assets that are your own. Any mixing of the two is strictly prohibited. The frequency with which you must provide an accounting to the beneficiaries should be stated in the trust. If it does not say how often, then an accounting should be provided at least annually.

Trust Registration Statement

Under the Colorado Uniform Trust Code (C.R.S. §§ 15-5-101, *et seq.*) a trust may, but need not, be registered in the State of Colorado in the district court where the trust has its principal place of administration. However, failure to register a trust subjects the trustee to the personal jurisdiction of any court in which the trust could have been registered. Further, if a settlor or qualified beneficiary demands registration, the trustee must register the trust within 30 days or be subject to sanctions, including removal or surcharge. Trusts created to facilitate qualification for medical or other public assistance under the federal Social Security Act, or that are otherwise not subject to the Colorado Uniform Trust Code, must also be registered. A trust may not be registered if doing so would be inconsistent with the jurisdiction

of, or registration in, a foreign jurisdiction. There are no deadlines for registration, other than those created following a demand for registration from a settlor or qualified beneficiary. There are court-approved forms for trust registration and amendments.

Potential Liability as Trustee

As the trustee, you may be liable to the beneficiaries for any loss to the trust and for any gain the trust should have realized but did not. The following are examples of ways in which a trustee may be found liable:

- ▶ If, for any reason, you failed to exercise the care and skill of a person of ordinary prudence in managing the assets of another;
- ▶ You negligently or intentionally did something that you should not have done, such as took funds from the estate, did not follow the will, or took other actions that breached your fiduciary duty as trustee; or
- ▶ You negligently or intentionally failed to do something that you should have done, such as failed to properly inventory the assets or pay the heirs or beneficiaries of the estate.

Again, this list is not all inclusive. It merely demonstrates some of the ways in which liability potentially may be incurred. Contact a probate attorney to seek his or her advice as to any potential problems that may arise.

28-6. Resources

Colorado Bar Association

(303) 860-1115 or toll-free (800) 332-6736
www.cobar.org

Colorado Department of Public Health and Environment

Vital Records Section
4300 Cherry Creek Dr. S.
Denver, CO 80246-1530
(303) 692-2200
www.colorado.gov/pacific/cdphe/categories/services-and-information/birth-death-and-other-vital-records

Colorado Judicial Branch

www.courts.state.co.us/Self-Help/Index.cfm

Funeral Consumer Society of Colorado

(303) 759-2800
www.funeralconsumercolorado.org

Social Security Administration

(800) 772-1213

www.ssa.gov

Department of Veteran Affairs

(800) 827-1000

TDD: Dial 711

www.va.gov

* Based on a chapter originally written by Mark Masters, Esq.