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Memorandum

To: Clients Nominated as Personal Representative of a Decedent's Estate

From: Chorney & Millard LLP

Re: Duties of a Personal Representative

This memorandum summarizes the process of administering a decedent's estate and the duties of the personal representative in that process. We hope you will find this summary useful. We suggest that you read through the entire summary once, to give you an overview of the probate process. Then keep the summary, so that you can refer to it from time to time during the course of estate administration. Please remember, however, that this is a summary only. It cannot cover every possible issue that might arise in connection with the decedent's estate, and it is not intended to take the place of discussions that will occur between us. Whenever a question arises, do not hesitate to contact us.

As personal representative, you will be charged with administering the decedent's estate. In general, that involves collecting and valuing the decedent's assets, paying the decedent's valid debts, expenses of administration, and taxes, and then distributing the remaining assets to the decedent's *devisees* (if there is a will) or *heirs* (if there is no will).

1. **Definitions.** We use a number of technical terms in this memorandum. The following definitions should help you understand these terms.
 - 1.1 *Probate* technically refers only to the court's determination of whether a document presented to it is in fact the valid last will of a decedent. However, *probate* is commonly used interchangeably with *administration*.
 - 1.2 *Administration* is the entire process by which a decedent's estate is collected, administered, and distributed.
 - 1.3 If the decedent left no will (died *intestate*), then there can be no probate, in the technical sense. There is, however, a determination of the decedent's heirs (the persons entitled to receive the intestate's estate) and an administration of the estate.

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- 1.4 An *executor* is a person named in the will to carry out the desires of the decedent as expressed in the will, and to administer the estate. If the decedent died intestate, the person appointed to administer the estate is an *administrator*. The general term *personal representative* refers to an executor or administrator.
- 1.5 A decedent's *devisees* are the people who receive property under the will. The *heirs* are the people who receive the estate under the *intestate succession* laws if there is no will (or who would receive the estate if there were no will).
- 1.6 The personal representative is a fiduciary, and the personal representative's obligations extend to *interested persons*. The term *interested person* is not defined precisely in the Probate Code. The term specifically includes heirs, devisees, children, spouses, and creditors (until the creditor is paid). The term also includes "any others having a property right in or claim against . . . the estate . . . which may be affected by the proceeding."

2. **Opening the Estate.**

The first step in the probate process is opening the estate and securing your appointment as personal representative.

The Colorado Probate Code generally allows the use of either *formal* or *informal* proceedings at any point in the process of estate administration. A formal proceeding is begun by filing a *petition*, which asks the court to take some action. The petition is filed with the court, and a hearing is scheduled for the court to consider the petition. Advance notice of the hearing, and copies of the petition, are provided to interested persons. Thus, an estate can be opened by petitioning for the appointment of the personal representative and for probate of the will if there is one. After the hearing date, if the court grants the petition, the judge will enter a formal order appointing the personal representative and probating the will if there is one.

When an informal proceeding is used, the person asking for the appointment of the personal representative files an *application* with an administrative officer of the court, called the *registrar*. If the registrar finds that the application is completed properly, contains all of the required information, and asks for the appointment of a proper person as personal representative, the registrar will grant the application.

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Because informal procedures do not require setting a hearing or advance notice to interested persons, they are usually quicker and less expensive than formal proceedings. In most cases, we open estates using informal proceedings. However, an informal proceeding can generally be questioned at a later time, by an interested party bringing a formal proceeding. Thus, if it is important to have the protection of a decision by the judge, and not just the registrar, then formal proceedings are necessary. In addition, informal proceedings cannot be used to resolve contested matters. Thus, for example, if there is a dispute about whether the document purporting to be the will is valid, a formal proceeding must be used.

3. **Letters.**

After the personal representative is appointed, the clerk of court will issue *letters*. The letters are the personal representative's evidence to third parties (banks, stock brokers, real estate agents, etc.) that the personal representative has been appointed by the court and has the authority to deal with the decedent's property. Third parties dealing with the personal representative may require copies of the letters that are certified by the court.

4. **Information of Appointment.**

Within 30 days after your appointment as personal representative, an *Information of Appointment* must be sent to each person interested in the estate. The Information of Appointment provides notice to the heirs and devisees that a personal representative has been appointed. We will prepare and send the Information of Appointment to the interested persons, and we will file the original with the Court.

5. **Notice to Creditors.**

We must publish notice in a newspaper to notify claimants of the decedent's death and that a probate administration has been commenced. This notice also limits the period during which claimants may file claims. We will arrange for publication of the notice to creditors.

Claims can be *presented* to the estate either by filing them with the court or by delivery to you as personal representative. Claims that arose before the decedent's death are barred if they are not presented within four months after the first publication of notice to creditors, except that claimants that you actually know about or could find out about with reasonable diligence may present claims up to one year after the date of death. You may shorten the time period for known or reasonably ascertainable creditors to present claims by sending them actual notice. Let us know

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if you are aware of any claimants to whom we might want to send notice. A claim that is presented by delivering the claim to you need not be on a special legal form. A regular bill or other statement for services may suffice as presentation of a claim.

As personal representative, you have a duty to pay all proper claims promptly. If the estate does not have enough assets to pay all claims, Colorado law provides for the priority in which claims are to be paid. Claims will accrue interest if they are not paid within 60 days following the time period for presenting the claim. If you decide that a particular claim should not be paid, let us know. If, after discussing the matter, we decide that the claim should be disallowed, then we will send a *Notice of Disallowance* to the claimant and file the original with the court. The claimant will then have 60 days in which to file a petition or begin a court action asking the court to allow the claim. If the claimant files a petition or brings a court action for allowance of the claim, the matter will be set for hearing, and the court will ultimately determine whether the claim is valid. If the claimant does not file a petition or begin a court action for allowance of the claim within the 60-day period, the claim will be barred.

Claims and debts may be deductible on estate tax or income tax returns. So that we may help you determine where claims should be deducted, please send us a complete list of claims such as funeral expenses, unpaid bills, real estate taxes, principal balances of mortgages, costs for death certificates, and appraisal fees.

You should decide soon whether you will want to be paid a fee by the estate for your work as personal representative. If you will take a fee, you will have to keep accurate records of the time you spend on estate matters, and we will help you determine a reasonable hourly rate. The fee will be income to you and will be deductible by the estate.

6. Inventory and Asset Information.

As personal representative, you must assemble, collect, and value all of the estate assets and prepare an *Inventory* of the decedent's *probate assets*. The probate assets are assets that were in decedent's name (but not in joint tenancy) and which do not pass under a beneficiary designation or in accordance with a contract. (Assets in joint tenancy or which pass under a contract or beneficiary designation to a beneficiary other than the estate are referred to as *nonprobate assets*.) The Inventory is due within three months after your appointment as personal representative. Once completed, the Inventory may either be filed with the Court or delivered to each interested person who requests it.

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You have a duty to protect and conserve estate assets. You must see that estate funds are properly invested. You must also see that property and casualty insurance is in place for real property and that estate property is protected from theft as well as is reasonably possible. You must be careful not to commingle estate property with any joint tenancy property, the separate property of a beneficiary, or your own property.

So that we may prepare a draft of the Inventory for your review, and also to advise you with respect to nonprobate assets, please send us copies of any of the following that apply:

- 6.1 The decedent's most recent personal financial statement.
- 6.2 Deeds to real property and any leases and, if there is debt against the property, a copy of the most recent statement.
- 6.3 All oil, gas, or hard mineral leases, assignments, deeds, or reservations, pooling agreements, division orders, and all other documents relating to the decedent's ownership of oil, gas, or other mineral interests.
- 6.4 The most recent statements for checking accounts, savings accounts, and money market accounts, and copies of certificates of deposit.
- 6.5 For stocks and bonds that the decedent held directly, including bearer bonds and government bonds, a copy of each stock or bond certificate.
- 6.6 For stocks or bonds held in a brokerage or other investment account, the most recent statement for the account (include all pages, not just the first page).
- 6.7 The most recent statement for each retirement plan or IRA, the plan document or summary plan description for each retirement plan, the IRA agreement for each IRA, and all beneficiary designation forms.
- 6.8 If the decedent owned a business or an interest in a business: (A) for a corporation, copies of the articles or incorporation, bylaws, and the decedent's stock certificate(s), (B) for a partnership or joint venture, the joint venture agreement or partnership agreement, and (C) for a limited liability company, the operating agreement. For all types of business organizations, copies of any buy-sell agreements and the most recent financial information concerning the organization.

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- 6.9 Promissory notes payable to the decedent. We will also need to know the balance remaining unpaid as of the date of death. If the note is secured, include a copy of the mortgage or other security document.
- 6.10 Insurance policies on the decedent's life or on someone else's life that were owned by the decedent.
- 6.11 The decedent's income tax returns for the past several years.
- 6.12 Motor vehicle titles with a description of the vehicle and the vehicle's mileage.
- 6.13 List of household furnishings with estimated value or appraised value of particularly valuable items.
- 6.14 Divorce decree or settlement agreement from any prior marriage of the decedent that ended in divorce, and, if the decedent was married at the time of death, any pre-nuptial or post-nuptial agreement.
- 6.15 Any gift tax returns that the decedent filed.
- 6.16 Information about any other assets not listed above that the decedent owned.

7. Accounting and Financial Records.

As personal representative, you must maintain complete records of all cash and investment transactions of the estate. Other beneficiaries have the right to information concerning the estate, to assure themselves that you are properly discharging your duties. *You should open an estate checking account in the name of the estate, and all receipts and disbursements should be run through that account.* The check register should contain complete and detailed information about each transaction. The check register can then be used to prepare the Accountings for the estate, and to assist with the preparation of income tax returns, as discussed below.

8. Ancillary Probate.

If the decedent owned any real property in a state other than Colorado, *ancillary* probate proceedings may be necessary in that state to clear title to that real estate.

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9. **Nonprobate Assets.**

The preceding discussion mainly concerns the *probate* estate. Joint tenancy assets, annuities, retirement accounts, interests in trusts, and life insurance benefits are generally not probate assets. Those assets must, however, be reported on the federal and Colorado estate tax returns, if returns are necessary. We will need a list of nonprobate assets, and we will have to determine the value of those assets as of the date of death.

Joint assets become the property of the surviving joint tenant automatically. However, some paperwork may be necessary to clear title in the name of the surviving joint tenant.

Claim forms for life insurance proceeds and annuities can be filed by the designated beneficiaries. If it appears that death tax returns will be required, we will need to obtain an IRS form 712 from each insurance company. If life insurance is payable to the estate, it is a probate asset.

Retirement accounts are also usually payable to a designated beneficiary and are not probate assets. Because there are complicated income tax issues in connection with the payment of proceeds from individual retirement accounts (IRAs), qualified pension plans, and tax-deferred annuities, please contact us before filing claims for these kinds of assets. In addition, if the decedent was already receiving minimum required distributions from retirement accounts, then the distribution for the final year may still need to be paid. Be sure to check with the account custodians to determine whether the distribution was made before the date of death.

10. **Taxes.**

10.1 **Death Taxes.**

If the value of all property in the decedent's estate exceeds \$3.5 million, then a federal estate tax return must be filed within nine months after the date of death. For purposes of the estate tax, the estate includes not only the probate assets but also the decedent's nonprobate assets, such as the decedent's interest in property held in joint tenancy, the decedent's retirement plans and IRAs, and life insurance on the decedent's life.

There is no longer a Colorado death tax. If the decedent owned any real property in states other than Colorado, however, state inheritance or estate tax returns may be required in those states.

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10.2 Income Tax Returns.

(A) Final Individual Returns.

The decedent's final federal and Colorado income tax returns, for the period beginning on January 1 of the year of death and ending on the date of death, must be prepared and filed, and any tax due must be paid. You must be careful to divide the income received and deductible expenses paid before the date of death from income received and deductible expenses paid after the date of death. You should have your accountant prepare the final individual returns.

(B) Estate Income Tax Returns.

The estate is a separate taxpayer for income tax purposes. We will obtain a taxpayer identification number for the estate. A federal income tax return (Form 1041) will be required in each year in which the estate's gross income exceeds \$600 or there is any taxable income. A Colorado fiduciary income tax return (Form 105) will generally be required in any year in which a federal income tax return is required to be filed.

The estate may file its income tax returns on the basis of a fiscal year. The estate's first fiscal year begins on the date of death and will end at the end of any month selected by you, so long as the first fiscal year does not exceed 12 months. The fiscal year is selected by filing a timely income tax return for the first year, using that fiscal year.

If it is necessary to file income tax returns for the estate or for a trust, we will discuss whether those returns will be prepared by us or by your accountant. If your accountant prepares those returns, we would like to receive copies of the returns before they are filed.

11. Accountings and Closing the Estate.

After all known debts, administration expenses, and taxes have been paid or provided for, you should prepare a Final Accounting. The Accounting is a statement of all cash receipts and disbursements of the estate. If a complete and detailed check register has been maintained for the estate's checking account and all transactions have been run through that account, preparation of the Accounting will essentially involve transferring information from the check register to the appropriate Accounting form.

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You may close the estate informally (without court review of the administration). If you close informally, then the Inventory and Final Accounting will be provided to interested persons but neither must be filed with the court. We will then help you to distribute the remaining assets to the appropriate beneficiaries, and we will prepare for you and file a *Verified Statement* with the court in which you state that the administration of the estate has been completed. If no matters are pending one year after filing the Verified Statement, your appointment as personal representative will terminate.

Alternatively, you can decide to close the estate formally. In a formal closing, the Inventory and Final Accounting must be filed with the court, and a petition will be filed to request approval of the Accounting and a proposed Schedule of Distribution. Notice must be given to all interested persons, and a hearing date will be set. If no objections are raised, usually no one need actually attend the hearing. You will be discharged from your duties as personal representative after the judge signs the order and all assets are distributed in accordance with the Schedule of Distribution.

12. **Disclaimers.**

If any beneficiary does not want to receive distribution of certain property from an estate, or of nonprobate assets such as life insurance benefits, retirement benefits, or joint tenancy property, then that beneficiary may *disclaim* the gift. Disclaimed property generally passes as if the beneficiary who makes the disclaimer had not survived the decedent. A disclaimer that meets certain requirements is not a gift for gift tax purposes. In general, to avoid being treated as a gift for tax purposes, a disclaimer must be made (A) before the disclaimed property has been received by the beneficiary and before the beneficiary has accepted the benefits of the disclaimed property, and (B) within nine months following the date of death. Usually, disclaimers are made to reduce estate taxes or to avoid exposing assets to creditors. We should discuss disclaimers as early in the administration of the estate as possible before benefits are received by the beneficiaries.

13. **We Represent You as Personal Representative.**

We represent you in your capacity as personal representative of the estate. If you, in your individual capacity, have a conflict with the estate, you will have to retain separate counsel to advise you with respect to your personal interest. We should discuss any possible conflicts as they arise. We will help you keep other beneficiaries informed of the status of the estate administration, but we do not represent the other beneficiaries. If they want legal advice, they must retain their own lawyers to advise them about their rights and interests.

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14. **Conclusion.**

The administration of a decedent's estate is obviously an important process. It clears the title to the decedent's property. It settles legitimate debts and wipes out others. It may establish a new income tax basis for the property in the estate. Following the proper administration procedures protects you in making distribution of the property to the heirs and devisees.

In order to assist you in performing your duties, we will need to obtain a great deal of additional information, and we will have to work together very closely during the coming months. We will send you copies of correspondence as well as other documents which are prepared.

Please do not hesitate to contact us if you have any questions regarding this memorandum, your duties, or the procedures that we follow.