

PERSONAL REPRESENTATIVE

You recently have been named as someone's personal representative. What does this mean? What are your responsibilities? What are potential liabilities?

Introduction

A person named to administer an estate used to be called an "executor." Now the term is "personal representative," regardless of whether that person is named in a will or is appointed because there was no will.

Administering an estate is much simpler than years ago, when "going through probate" meant much time and complications. Most Nebraska estates can be taken care of in about a year. The purpose of a personal representative is to carry out the wishes of the decedent regarding distribution of his assets, and to complete the decedent's business, such as paying bills and filing tax returns.

Your Specific Duties

Take possession, manage, and preserve the decedent's property. The personal representative has a duty to:

- Take possession of the decedent's property, unless the decedent's Will provides otherwise. The personal representative may, however, leave the decedent's real property or tangible personal property with a person who is presumed to be entitled to the property until the personal representative needs possession of the property to administer the decedent's estate.
- Manage, protect, and preserve, and pay taxes on, the estate in the personal representative's possession.

Prepare an inventory of the decedent's property. The personal representative has a duty to:

- Prepare, within three months after being appointed, an inventory of property owned by the decedent at the time of death. Each item of property listed on the inventory should be described in reasonable detail. For each item, the inventory should also indicate (1) its fair market value on the date of the decedent's death and (2) the type and amount of any mortgage, lien, or other encumbrance, if any, against that item. If an item was appraised, the inventory should indicate the name and address of the appraiser.

Publish a notice to creditors. The personal representative has a duty to publish a "notice to creditors" in a newspaper of general circulation in the county where the probate is filed. The notice should be published once a week for three successive weeks. The notice should (1) announce the personal representative's appointment and address and (2) state that creditors of the estate should

present their claims within sixty days after the date of the first publication of the notice or be forever barred.

Pay creditors' claims and applicable taxes. With respect to claims filed by creditors, the personal representative has a duty to:

- Provide for homestead, family, and support allowances before paying creditors' claims.
- Decide which creditors' claims to allow or disallow.
- Pay allowed creditors' claims in the following order:
 - (1) reasonable funeral expenses;
 - (2) costs and expenses of administering the estate;
 - (3) debts and taxes with preference under federal law;
 - (4) reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him;
 - (5) debts and taxes with preference under other Utah law; and
 - (6) all other claims.

The personal representative also has the duty to file any applicable tax returns and pay any applicable taxes. Applicable tax returns will include the decedent's final federal and state income tax returns and may also include, depending on the circumstances, federal and state income tax returns for the decedent's estate, federal and state gift tax returns, or federal and state estate tax returns.

Make Distributions to beneficiaries. You must make distributions to the heirs or to the beneficiaries under a will.

When carrying out these specific duties, the law expects you to be impartial. This means you cannot favor one person or yourself over others involved in the estate. You are also expected to administer the estate with care and prudence (and there are legal definitions about what this means). Remember, you are handling somebody else's money and assets.

Your Authority

You will be issued "letters" from the court, which say that you have been appointed 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.

Opening And Closing

After a person dies, the estate is "opened" when the proposed personal representative files certain forms with the court. This lets the court know that an estate is actively being administered. (Once an estate is opened, the court will issue you the "letters" mentioned above). An estate is "closed" when the final papers are filed with the court, saying that bills are paid, assets have been distributed, and everything is in order.

Formal or Not?

In Nebraska, we have a flexible system of estate administration. Generally, you can choose how formally you will open and close the estate and the extent of court supervision over your activities as a personal representative.

Formal proceedings will result in final and binding court orders and involve notice being sent to interested parties (beneficiaries, creditors, etc.) about actions to be taken. There may be a court hearing if somebody objects. This option is used if something in the case is out of the ordinary. For example, statutes may require formal opening if the will is irregular. Formal proceedings may also be used to settle a dispute, such as if family members disagree over who should be the personal representative.

With informal proceedings, there is no advance notice to parties and no binding orders from the court. This option is usually chosen when there are no controversies or aspects of the case that are out of the ordinary. Sometimes estates are opened informally, but closed formally, so as to get the protection of a court order for the personal representative that everything has been done correctly.

Your General Responsibilities

1. Even before you get letters from the court, if you are named personal representative in a will, you have the power to carry out written instruction of the deceased relating to his body, funeral, cremation and burial arrangements. You can begin to protect the decedent's assets. However, no assets should be distributed prior to opening the estate.
2. Set up an estate accounting system at the beginning of administration of the estate. For your protection, keep records of all cash and other financial transactions of the estate and provide written accountings to the beneficiaries. This is very important and often not done correctly. In a supervised administration or with a formal closing, the accounting forms are filed with the court. This information will also be required for tax purposes.
3. Within three months, you must prepare a written inventory of the estate assets. The inventory must be filed with the court.
4. Being sure that all proper bills are paid is an important part of your job. Send a Notice of Appointment to known creditors such as credit card companies, physicians, banks, etc.) that the person has died and you are the personal representative.

Another notice in the newspaper will be published for unknown creditors. Once the Notice of Appointment is published, if creditors don't send you a bill within sixty days after first publication, the claim is forever barred.

A claim may be filed with the court. No specific form is required. If you disagree with the claim, you have 60 days to tell the claimant in writing. They then have 60 days to begin proceedings to enforce the claim.

It's a good idea not to pay any claims until you've determined what they all are, and

until you've reached the end of the time in which someone can make claims.

5. While the estate is being administered, The Nebraska Probate Code authorizes a "family allowance" of \$9,000 for a surviving spouse and/or minor children. The Code also provides for a \$5,000 allowance to the surviving spouse or family members that is generally exempt from creditors of the estate. When the family is entitled to these allowances, they are made before creditors are paid.

The Nebraska Probate Code has attempted to ensure that a spouse is not completely "disinherited" from an estate. Also, a child born or adopted after the will and omitted from a will generally has a right to share in the probate estate. If there is a dispute about this, you shouldn't make any distributions until it is worked out. Provisions about this are technical and should be discussed with a lawyer.

6. As personal representative, you're responsible for managing the estate until it is distributed. What you can and can't do may be specified in the will.

Once you're appointed, you have full authority and control over the assets, which the decedent owned in his name alone or as a co-tenant with others. (Property held in joint tenancy with right of survivorship is not a probate asset, nor are proceeds of life insurance that are payable to a named beneficiary other than the estate.)

7. To put others on notice of your authority, re-register the decedent's assets in the name of the estate with you listed as personal representative (you will use your letters of appointment as evidence of your authority). For registered stocks and bonds, submit your letters of appointment to the transfer agent, along with the securities and an affidavit of domicile, which you get from a broker or a bank. If you need to sell some securities to raise money for estate expenses, you can do so without having the securities registered first, although it usually takes longer to get the proceeds. Bearer bonds need not be re-registered. When you sell or distribute any real estate, you will need to use your letters of appointment.

Since the administrative period is relatively short in Nebraska, you won't need to establish a long-range investment program. The estate needs to have sufficient cash to pay bills, taxes and expenses, but you don't need to convert everything to cash to divide it. Assets owned by the decedent (for example, real estate) can be retained, if they're not speculative in nature and as long as there is proper diversity among the estate's investments.

The investment standard you will be held to, as a personal representative, is called "The Prudent Investor Rule" under Nebraska law. It emphasizes that you manage the assets intelligently and carefully, as the assets of another, with an eye toward permanent disposition of funds.

8. You will need to settle up the taxes. This always includes filing a final income tax return for the decedent even if the decedent paid no income taxes in recent years. You may have to file a separate income tax return for the estate.

You *may* also have to file federal and Nebraska estate tax returns if the estate is big enough to require it (in 2006, if the total value of all assets exceeds \$1,000,000 under Nebraska law, and \$2,000,000 under federal law, with this amount scheduled to increase in years to come). Note that for estate tax purposes, the decedent's estate includes non-probate assets such as joint tenancy assets, life insurance, 401(k) and IRA plan, and assets held in trust. Federal estate tax returns are very complicated, and are due nine months from the date of death.

When a person dies, his taxable year ends on the date of his death, and his income and deductions are reported through that date. If the decedent was married when he died, the estate can join with the surviving spouse in filing a joint income tax return for the year in which the decedent died. You may also be able to take certain deductions on the decedent's final income tax return or claim them as an expense of administration on the federal estate tax return.

The estate is a separate tax-paying entity and you must get a separate tax identification number from the IRS. File a request for this number through the district director of the IRS on form SS-4. You will need this number to open estate bank accounts as well as to transfer securities into the name of the estate if they are to be held for any period of time. The tax return used to pay income taxes for the estate is called a fiduciary income tax return. For the IRS, it's form. These forms must be filed if the estate has any taxable income or has gross income of \$600 or more in any taxable year. You may use either the calendar year or fiscal year as the "taxable year." Which one you choose will have various financial implications, and you should discuss this with an attorney or accountant.

Estate income tax returns must be filed on or before the 15th day of the fourth month following the close of the taxable year (April 15 if you use the calendar year). You must pay the entire tax due. After the second year, you must file income tax estimates and make quarterly estimated tax payments.

9. You may choose to be compensated for your duties as personal representative. Your compensation and that of your attorney is subject to a "reasonableness test" under the Nebraska Probate Code. Family members often choose to serve without pay, except for out-of-pocket costs. If you do this, consider filing a fee waiver with the court. If you take compensation, you must keep a detailed record of tasks performed and t1)
10. The assets of the estate belong ultimately to the beneficiaries and not to you. Make distributions to beneficiaries as soon as it can be done safely.

Generally, estate assets are paid in this order:

those held by the decedent as a fiduciary, such as if the decedent was serving as a trustee of a trust at the time of death

family allowances (as mentioned before)

expenses of administration

funeral costs

debts and taxes under Federal law

debts and taxes under state law

expense of last illness

bills

specific gifts under a will

beneficiaries under a will, or heirs, when there is no will

Distribution doesn't have to wait until the estate is closed. You can make payments as priority is determined. Even partial distributions may be made to beneficiaries during administration. (In the rare cases where administration is supervised, distribution may be made only following a court hearing and order.) But remember, as personal representative, you are responsible if you distribute assets and then find you need the assets to pay legitimate claims.

11. The estate does not terminate automatically. You may elect to close formally or informally.

In informal closings, a closing affidavit form is filed with the court, indicating that the estate has been fully administered. This limits the time to one year when those who receive assets and creditors can challenge your administration and distribution of the estate.

In formal closings, the administration and proposed distribution of the estate is approved by the court and the personal representative is immediately discharged or released from liability by court order.

12. The Nebraska Probate Code is intended to speed up the process of administration of estates. Nebraska has a separate inheritance tax. However, with smaller estates the majority of estate assets may often be distributed well before closing. Larger estates often involve filing estate tax returns and may not be closed until accounts are settled with the taxing authorities. However, if the tax and probate aspects are handled in an organized way, and there are no complicated assets such as family businesses, the great majority of larger taxable estates can be closed with two years.

Your liability: You are liable to the beneficiaries for any loss to the estate and for any gain the estate should have realized but did not, or if you were negligent or intentionally did something you shouldn't (or failed to do something you should have).

OTHER GENERAL RESPONSIBILITIES.

1. Contacting the Social Security Administration and the Veteran's Administration to apply for any death benefits or survivor benefits for which the decedent's estate may be eligible.
2. Locating insurance policies and applying for benefits if the proceeds are payable to the estate. If payable to an individual, the personal representative should deliver the policy to the beneficiary. Generally, when applying for insurance or other benefits, the personal representative must present the insurance policy or other benefit certificate, a certified copy of the death certificate, and letters of authority to act on behalf of the estate.
3. Contacting the decedent's employer and any club or fraternal organization to which the decedent may have belonged to determine if the estate or surviving family members are entitled to any benefits.
4. Examining the circumstances surrounding the decedent's death to determine if there are any claims against third parties which need to be asserted or preserved, such as claims for wrongful death or worker's compensation.
5. Giving notice to creditors of the estate to file their claims against the estate, by publishing a notice in the county legal newspaper. Actual notice (for example, by regular or certified mail) must be given to known or reasonably ascertained creditors.
6. Collecting rents, accounts receivable, interest, dividends and other income due to the decedent prior to death and that becomes due to the estate thereafter.
7. Assuming responsibility for any litigation or settlement of any pending lawsuit in which the decedent had an interest.
8. Keeping the property of the estate in good repair.
9. Keeping the estate property invested properly until the administration is complete.
10. Reviewing the decedent's personal records.
11. Opening appropriate estate bank accounts for payment of debts and expenses.
12. Locating and accessing any safe deposit boxes in the decedent's name,
13. Sell real property or continue to make mortgage payments,
14. The personal representative cannot be required to pay debts of the decedent to creditors who have received notice and not presented a claim. The personal representative should consult with his/her attorney to determine which debts/ timely filed claims to pay. Expenses of administration, debts of the decedent, and family allowances are divided by statute into eight classes. Items in each class have a priority for payment over those of subsequent classes.

ACCOUNTING AND RECORDS

Since the personal representative is personally accountable for all of the assets of the estate, one of the most important functions of administration is to maintain accurate and detailed books of account. The size and complexity of the estate will dictate the degree of sophistication needed, and the personal representative may find it necessary to employ an accountant to assist in preparing and maintaining the estate's financial records. Of course, any bank or trust company serving as a personal representative will have the expertise and facilities necessary to prepare and maintain detailed financial records for an estate.

In most estates the accounting records will consist at a minimum of a checkbook, a journal, and appropriate ledgers to complement entries made in the journal. The accounts set forth all assets received and disposed of by the personal representative during the course of administration, all disbursements to pay debts and expenses, and the balance available for distribution to the beneficiaries.

In many estates it is imperative for the personal representative to distinguish between income and principal assets so that proper distributions of income and principal can be made.

In smaller estates, it may be sufficient to handle all receipts and disbursements through a checking account, as the canceled checks and deposit slips will provide clear and sufficient records for the purposes of substantiating the final accounting, required by *Nebraska law*, or any other accountings.

The basic purpose of maintaining the books and records of the estate is to set forth the financial history of the estate which serves to protect the personal representative from liability. Also, properly maintained books of account are an invaluable aid to the personal representative in making investment decisions, tax planning, and planning for the payment of debts and distributions to beneficiaries.