

## PERSONAL REPRESENTATIVE

### DISCLAIMER

*This article is intended for informational purposes, only. It does not constitute legal advice. Nor is it a substitute for legal advice.*

This article provides a description of the basic duties and powers of a personal representative. This article should be read in conjunction with separate articles entitled *Probate* and the *Personal Representative's Checklist*.

A personal representative (PR), also called an executor and sometimes an administrator, represents the estate of a person who has died (the decedent). The PR is a fiduciary, which means that the PR is in a position of trust, and owes certain duties to the estate, its beneficiaries and its creditors. The estate, in general, is the collection of assets, interests and liabilities of the decedent.<sup>1</sup> The beneficiaries, in general, are those persons who are to receive something from the estate. The creditors are those persons who have a valid claim or debt owing from the decedent. The duties that the PR owes will be described in some detail below, but as a general matter the principal duties are to manage the affairs of the decedent, to make sure that the decedent's valid debts are paid and to distribute the assets of the estate as directed in the decedent's will.

The PR for an estate is typically someone named by the decedent in his or her will. A PR acquires his or her authority on behalf of the estate through a probate court's issuance of a *letter of personal representation*. In most jurisdictions, the appointment of the PR by the court may relate back to the date of death, if doing so would give legal effect to acts by the PR that benefit the estate. In other words, if the PR is compelled to act before the letter of personal representation has been issued by the court, those acts will be legally valid so long as they benefit the estate.

Most probates in Nebraska are *informal* probates, as opposed to formal probates. In an informal probate, in general, the personal representative acts without regular supervision by the probate court. The court in effect sits on the sideline, and only becomes involved if someone petitions the court to get involved. Such a system of informal probate is one of the hallmarks of efficiency in probate proceedings under the Uniform Probate Code. Interested parties, including, of course, the PR, do have the right to ask the court to become more directly involved.

What is a fiduciary? As stated, it is a position of trust, and, as such, it involves certain standards and obligations. The PR must use skill and care in the performance of duties, and exercise loyalty to the estate, the beneficiaries and the creditors. The duty of loyalty

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<sup>1</sup> As stated, the estate is the collection of property interests and liabilities owned and owed by the decedent at the time of death. We speak of a probate estate, and also of a taxable estate. These are not always the same thing. Some property, such as pay-on-death bank accounts, or insurance death benefits, may pass to the beneficiaries directly and not through the will or a probate proceeding, and yet those assets may still be part of the decedent's taxable estate.

generally means that the interests of the estate, its creditors and its beneficiaries come first. The PR should not treat estate property as if it were his or her own, and should not commingle the estate's assets with his or her own assets. The PR is not to be self-dealing, though it is often true that the PR may also be a beneficiary of the estate, and so some transactions the PR enters into on behalf of the estate will necessarily benefit the PR personally. Such transactions should be authorized by the decedent's will or approved by the court. The duty of care essentially means that the PR must act as a prudent person would act in taking care of his or her own affairs.

#### What a PR *Must* Do

As stated, in essence the PR is to gather assets, pay creditors and disburse property to the heirs. The following is a description of the essential duties of the PR:

- The PR is to submit the will into probate, i.e. file it with the probate court, if the PR is in possession of the will.
- The PR is to be diligent in trying to locate the heirs and distributees.
- The PR is to seek out, collect and preserve all the assets of the estate, that is, all of the decedent's property. This does not necessarily mean taking physical possession of assets but it does contemplate taking control over assets. The need to preserve assets may also involve determining whether or not there exists adequate insurance on the assets, making sure that taxes are promptly paid, and obtaining the surrender of property to the PR which is in the possession of third parties. This includes the ability and authority in some cases to avoid transfers, that is, to recover property which the decedent transferred prior to death.
- The PR is charged with preparing and filing an inventory of the estate within three months (in Nebraska) of his or her appointment. The inventory includes assets, liabilities and a determination of fair market value, which may entail the hire of appraisers. The duty to file an inventory is continuing, so that the PR must file supplemental inventories if additional assets are discovered after the first inventory is filed.
- The PR is to take charge of (exercise control over) personal property of the decedent.
- The PR is to collect all debts due to the decedent.
- The PR is to defend legal actions against the estate.
- The PR is to pursue all of the estate's valid claims.
- The PR is to fulfill the decedent's contracts (for example, a forward contract to sell grain).
- The PR is to take steps to ensure that the estate is properly distributed.

#### What a PR *Can* Do

To accomplish these obligatory duties, the PR is extended a number of powers by state statute. The Nebraska statute, which is based on the Uniform Probate Code, lists twenty-seven powers in all, and includes powers to retain assets pending distribution or liquidation; receive assets; perform, compromise or refuse to perform the decedent's contracts; satisfy charitable pledges; incorporate businesses or ventures the decedent was engaged in at the time of death; sell, mortgage or lease real or personal property of the estate; prosecute or defend claims; make allocations of income and principal as provided

by law; enter into leases, even those that might extend beyond the term of administration; abandon property; vote stock; make repairs or alterations in buildings; borrow money; insure assets; pay taxes, assessments, and expenses of the PR; compromise debts; employ professionals, and so on. All of these powers must be exercised *within the scope of the PR's fiduciary duty*, which, again, requires that the PR put the interests of the estate before his or her own interests, treat everyone fairly, and do these things with care and skill. The numerous powers of the PR arise within the context of the primary fiduciary duties, that is, to manage the estate, pay the valid creditors and distribute the assets *in accordance with the decedent's wishes*.

### Gathering Estate and Preparing Inventory

As stated, the estate is the collection of property interests and liabilities owned and owed by the decedent at the time of death. The probate estate is made up of property owned by the decedent at the time of death which will transfer to the heirs or other distributees only through the court process of the probate. In other words, it is through the probate court that title to the probate estate transfers to the heirs and distributees. Such probate property may include property held by decedent in his or her own name at the time of death, tenancy-in-common property or even life insurance, retirement accounts or annuities which name the decedent's estate as the beneficiary. However, most people will own property at the time of death which does not require a probate for transfer to heirs or distributees, as for example, property held by the decedent in joint tenancy with right of survivorship, or pay-on-death bank accounts, or insurance death benefits which will be paid directly to the named individual beneficiaries, as opposed to the estate. In addition, property held in funded revocable trusts at the time of death will typically pass to the trust beneficiaries without the need of a probate.

It is important to know that there is very often a difference between the probate estate and the decedent's taxable estate. They are very often not the same thing. Property which will transfer without the need of the probate process is not typically part of the probate estate but it very often is part of the decedent's taxable estate. In general, any property in which the decedent at the time of death held a beneficial interest is part of the taxable estate. So, the funds in a pay-on-death bank account owned by decedent at time of death are part of the taxable estate. Property held in the decedent's revocable trust at the time of death is typically part of the taxable estate. Insurance death benefits from a policy owned by decedent at the time of death are part of the taxable estate.

It is important that the PR be aware of all the decedent's property interests, both the probate estate and the taxable estate, and that the PR keep clear what is in each estate. The probate estate is held by the PR as a fiduciary. The probate estate is subject to the claims of the decedent's creditors. The taxable estate is in general subject to federal estate taxes, if any, and state inheritance taxes, if any. There are mechanisms for taxing authorities to reach assets in the taxable estate even though they may not be part of a probate estate, often through the imposition of liability on the persons who receive those assets from decedent.

### Finding the Assets

Most PRs will have access to the decedent's end-of-life information and if the decedent has been thorough in compiling such information the task of locating estate property may be quite simple. In situations where the decedent did not assemble such information for whatever reasons, the PR may first try to locate records and account statements from family members, and professional advisors (CPA, attorney, bank officer, insurance agents, etc.). Some common methods used to locate all the probate assets include

- annual financial statements and balance sheet
- a real property title search
- examination of 3-5 year's of tax returns, especially depreciation schedules, Schedule B and Schedule D
- reviewing checking account statements and credit card bills
- insurance policy riders for large personal property items
- review of decedent's mail

### The Inventory

In Nebraska, the PR is required to file an inventory with the probate court within three months of his or her appointment. The inventory is to be complete and the values are to be accurately stated. The valuation of assets does not necessarily require an appraisal. Certain assets which are difficult to value, such as interests in closely held businesses may require an appraisal. The need for an appraisal often turns on the size of the estate and the need to document values for estate and inheritance tax purposes, or for the heirs' capital gains tax purposes. Should the IRS undertake an audit of an estate tax return (if one has to be filed), the inventory will typically be one of the documents that the IRS reviews.

### A Word about Life Insurance

Most life insurance death benefits will be paid directly to the named beneficiaries; those benefits will not pass through or become part of the probate estate unless the decedent named the estate as the beneficiary. Whether or not life insurance death benefits are part of the decedent's taxable estate can be a more complicated question. If John owns a life insurance policy on his own life, the death benefits at his death become part of his taxable estate for federal estate tax purposes.<sup>2</sup> Let's assume there was a life insurance policy on John but the policy was owned by his daughter and let's also assume that John had no control over the policy during his life and that the death benefit passed directly to his daughter at the time of John's death without any strings attached. Those death benefit funds would not become part of John's taxable estate. However, if John's daughter is required to use those death benefit funds to pay the taxes or other estate obligations of John's estate, the funds will likely become part of John's taxable estate. In addition, even though the policy was owned at the time of death by John's daughter (or perhaps by an irrevocable life insurance trust), if John retained "incidents of ownership" over the policy before his death, it is likely that the death benefits will be included in John's taxable estate. Finally, if John transferred ownership of the life insurance policy to his daughter within three years of his death, the death benefit will become part of his taxable estate.

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<sup>2</sup> The death benefit is not part of John's taxable estate for Nebraska inheritance tax purposes provided the estate is not the named beneficiary.

The purchase and ownership of life insurance policies can be subject to complicated rules governing whether or not the death benefit will be included in the decedent insured's taxable estate. For an estate which is beyond the protections of the unified credit, that is, more valuable than the exclusion amount (presently \$5.34 million per person), the tax status of life insurance death benefits becomes a very important planning consideration.

#### Hiring Advisors

The PR hires agents for the estate, as necessary, which may include an attorney, an accountant, an appraiser, a real estate agent, etc. A PR may delegate duties to agents but in general only those duties which the PR cannot perform. The PR may not delegate a fiduciary duty. The PR is to exercise fiduciary duties in selecting and supervising the agents.<sup>3</sup> In general, a PR will not be held liable for the actions of agents so long as the PR exercised fiduciary duty of care in selecting those agents.

#### Attorney Fees

In general, there are two methods of attorney compensation employed in estate work, the hourly rate or the percentage fee. The latter is typically based on a percentage of the value of the estate's assets. The PR negotiates the fee arrangement in selecting an attorney to represent the estate. No matter which compensation mechanism is agreed to, the fees charged by the attorney must reflect the work performed. In other words the fee must be reasonable in light of the work performed by the attorney. A PR who finds the final fee amount unreasonable may, in addition to negotiating with the attorney, ask the court to rule on the reasonableness of the fee.

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<sup>3</sup> The Nebraska statute (§ 30-2476 (21)), which is based on the Uniform Probate Code, provides, with respect to the PR's employment of agents, that the PR may:

employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his or her administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary.

This section supports the PR's significant discretion in hiring advisors and agents.