

Personal Representative Responsibilities



MontGuide

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This publication explains Montana law covering the duties of a personal representative in settling an estate (often called 'executor' in other states).

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WHEN A PROPERTY OWNER DIES, WITH OR

without a will, Montana law provides legal procedures for settling his or her estate. If probate is required the process takes place under jurisdiction of the district court in the county where the deceased lived. If the decedent held all property as a joint tenant with right of survivorship with another person, probate is not required. Instead, a much shorter process called 'termination of joint tenancy' occurs. For more information about Joint Tenancies, see MSU Extension MontGuide *How to Transfer Real Property in a Joint Tenancy or in a Life Estate Without Probate* (MT201606HR). With this process, documents are filed with the Clerk and recorder in the country where the real property is located. For more information about probate, ask for the MSU Extension MontGuide, *Probate in Montana* (MT199006HR).

Under Montana law, you are free to make a will or not, as you choose. If you make a will, you may nominate the person to carry out your plan for the settlement of your estate. In Montana, the individual who performs this function is called a **personal representative**. Formerly, the terms 'executor' or 'administrator' were used.

This MontGuide provides a general outline of the duties and responsibilities of a personal representative during the settlement of an estate. It is not intended to cover all details. Some responsibilities are common to every estate; others will depend on the complexity of the estate.

Who should be your personal representative?

A friend, family member, corporate entity or bank can serve as your personal representative. The best choice for your situation depends on the people and circumstances involved. You should give careful consideration to your personal estate planning objectives and the consequences of each of the possible choices before making a selection. Actually, a testator (the person writing a will) nominates a personal

representative in a will. The district judge or the clerk of court makes the appointment.

If you do not name a personal representative in your will, or if you die without writing a will, the district judge will appoint a personal representative to settle your estate. The order in which eligible persons may apply for appointment as a personal representative, if the will does not specify one, is provided in the Montana Uniform Probate Code.

The order is the following: surviving spouse who is a devisee (named in the will) of the decedent, the custodial parent of a minor decedent, other devisees of the decedent, the surviving spouse of the decedent, other heirs of the decedent, and public administrator. In performing his or her duties a personal representative must follow procedures in the Montana Uniform Probate Code.

A personal representative must be 18 or more years of age. A Montana personal representative need not be a resident of the same county or state as the deceased. For example, he or she may be a resident of Glendive and serve as a personal representative in Helena. Or, he or she may be a resident of another state, such as Wyoming, and still serve as personal representative in Montana.

Many people choose a family member or friend to be the personal representative, thinking it will be easier and cheaper for that person to settle the estate because of familiarity with it. This is not necessarily true. Most people do not share their total financial situation with friends. Even a family member may not be aware of all the intricacies of the estate. A family member or friend not working with an attorney could take longer to settle the estate and incur unnecessary expenses because he or she is unfamiliar with legal procedures and deadlines. However, if the personal representative is advised by a competent attorney, he or she should have no problems.

When a family member or friend serves as a personal representative, misunderstandings or hard feelings could

arise. Certain family members may feel that the personal representative did not act impartially and was unfair in his or her actions. They may not be aware that, even if the personal representative disagrees with the provisions of the will, he or she must carry them out anyway.

Friends and family members also may be so preoccupied with their own affairs that they may not have the necessary time and attention to devote to settling an estate. And of course, the possibility exists that a family member or friend named as personal representative may die before you do. For this reason, you may want to name an alternate.

Another possibility for personal representative is a corporate entity such as a bank or trust company. Most banks and trust companies have facilities, contacts, experience, and business judgment beyond those of a single individual. In addition, banks and trust companies provide continuity. A bank or trust company doesn't get sick, die, or move away. Usually, the bank or trust company selected to be the personal representative of an estate is the one with which the testator does business, and where he and his family are known.

An attorney can also be chosen as a personal representative. Because of professional education he or she may be more familiar with the laws pertaining to probate action and provisions of income and estate, taxes than the average citizen.

Regardless of whom you choose to be a personal representative, tell the person chosen and explain what you want done before naming him or her in the will. You may find the person selected does not wish to take on the added responsibility. If so, choose someone who is willing to assume the duties of a personal representative.

Can more than one person be appointed personal representative?

Yes. Montana law provides for the appointment of more than one personal representative. You may want a member of the family to serve as personal representative but believe that certain business aspects of the estate can be handled more efficiently by a bank. You may name the family member and the bank as co-personal representatives in your will.

Another possibility is to appoint two of your family members. When two or more persons are appointed co-representatives, unless the will provides otherwise, everyone must sign papers and agree to acts connected with the administration and distribution of the estate. This can be very time consuming and cumbersome when the joint personal representatives live in different towns or states.

How does the personal representative acknowledge the fiduciary relationship and obligations to the deceased's estate?

Effective October 1, 2011 Montana Statutes require that every application for appointment as the personal representative of a decedent's estate, as a guardian, or as a conservator shall sign and verify before a notary public or under penalty of perjury the following statement. A form for the statement is available online at www.montana.edu/estateplanning/acknowledgementof_fiduciaryrelationship.pdf. Following is an example of the statement:

By signing, accepting or acting under this appointment, I acknowledge that I will assume the duties and responsibilities of a fiduciary and that I must work exclusively for the benefit of the decedent's estate and its beneficiaries, the ward under any guardianship, or the protected person under any conservatorship. I also acknowledge that the primary duty of a personal representative, guardian, or conservator is the duty of loyalty to and protection of the best interests of the estate, ward or protected person. Therefore, I acknowledge that:

- I may not use any of the property or other assets of the decedent's estate, ward or protected person for my own personal benefit;
- I must direct any benefit derived from this appointment to the decedent's estate, ward or protected person; and
- I must avoid conflicts of interest and must use ordinary skill and prudence in carrying out the duties of this appointment.
- I declare under penalty of perjury under the laws of the state of Montana that the foregoing is true and correct.

Signed this _____ day of _____, 20____. Signature of applicant _____

Must the nomination of personal representative, either by will or the court, be accepted?

No. If the personal representative named in the will or by the court does not want to serve, he or she may renounce the right by written notification to the court. The district judge or clerk of court then appoints another personal representative according to the order listed in the Montana Uniform Probate Code.

Is bond required of a personal representative?

A bond, generally equal to the value of the estate of the decedent, is required of a personal representative under certain circumstances to protect the estate. A bond is required of a personal representative under the following situations: if required by the court, if he or she is appointed special administrator, if required by the will, or if an interested person gives written notice to the court demanding that bond be posted and the court concurs. Otherwise, bond is not a requirement.

What are the responsibilities of a personal representative?

In general, a personal representative settles and distributes the estate as indicated by the will and the Montana Uniform Probate Code as quickly and efficiently as is consistent with the best interests of the estate.

To accomplish this, the personal representative will need to make sure the following tasks are completed within any legally specified time limit:

- Carry out written instructions of the decedent relating to his or her body, funeral, and burial arrangements.
- Arrange for the immediate needs of survivors.
- Locate the will and other important papers and information.
- Make application to probate the will or to terminate joint tenancy or for appointment as personal representative no sooner than five days after the death of decedent.
- Select an attorney to handle the estate (if necessary).
- Give legal written notice of his or her appointment to heirs (no will) and devisees (by will). No later than 30 days after his appointment, the personal representative must indicate whether bond has been filed and describe to the court where papers relating to the estate are on file.
- Take possession of estate property, as advisable.
- Notify decedent's life insurance companies.
- Pay expenses for last illness, funeral and burial expenses, and other debts.
- Have real and personal property appraised.
- Prepare an inventory of all of decedent's property.
- Publish a notice to creditors for debts of which the personal representative may be unaware.

- Prepare and file a federal estate tax returns if the estate is subject to estate tax (\$5.45 million in 2016 and \$5.49 million in 2017).
- Prepare and file Montana and federal income tax returns for the decedent's last year of life and, if necessary, for the estate.
- Arrange for the family's immediate living expenses.
- Determine which estate assets will be needed to pay federal estate taxes (if due) (\$5.45 million in 2016 and \$5.49 million in 2017), administration expenses and other costs of settling the estate.
- Satisfy charitable pledges in the decedent's will.
- Ascertain the values at date of death for all of the decedent's bank accounts securities. Depending on circumstances, close those accounts and open an estate account.
- Deposit or invest liquid assets of the estate in federally insured interest-bearing accounts, readily marketable secured loan arrangements or other prudent investments, if funds are not needed to meet debts and expenses currently payable.
- Distribute assets as required by law of intestate succession (no will) or by the decedent's will.

These are only a few of the numerous separate and distinct duties for which a personal representative can be accountable. The complexity of an estate will determine other responsibilities.

How Much Does a Personal Representative Get Paid?

A personal representative is entitled to reasonable compensation for his or her services. The fee is considered income for Montana and federal taxation purposes. The Montana Uniform Probate Code places limits on the amount of compensation that may be paid without a court order. The amount cannot exceed three percent of the first \$40,000 of the value of the estate and two percent of the value of the estate in excess of \$40,000.

Example: Assume a probate estate of \$200,000. The personal representative fee is \$4,400.

$$\begin{array}{r} \$40,000 \\ \times .03 \\ \hline \$1,200 \end{array} \qquad \begin{array}{r} \$160,000 \\ \times .02 \\ \hline \$3,200 \end{array}$$
$$\$1,200 + \$3,200 = \$4,400$$

In proceedings conducted for the termination of joint tenancies, the compensation of the personal representative may not exceed two percent of the value that passes to the surviving joint tenants.

In proceedings conducted for the termination of a life estate, the compensation allowed the personal representative may not exceed two percent of the value of the life estate if it is terminated in connection with a probate or joint tenancy termination. If a life estate is terminated separately, the personal representative's compensation may not exceed two percent of the value of the estate, except that it may not be less than one hundred dollars (\$100).

If there is more than one personal representative, only one compensation is allowed. The amount is divided between the co-representatives.

The district court may allow additional compensation for extraordinary services, which happens only after notice has been given and a hearing held.

If the will provides for the compensation of the personal representative and there is no contract with the decedent regarding compensation, the personal representative may renounce the provision before appointment. He or she would then be entitled to compensation under the terms of the Probate Code. A personal representative also may renounce his or her right to all or any part of the compensation.

Surviving spouses and lineal descendants often waive their fee for serving as personal representative for two reasons. One is to save the estate money. The other reason is they would have to declare the fee as income and pay at the rate of their state and federal income tax brackets.

Example: Susan was named as personal representative for her mother's \$200,000 estate. She could have claimed a fee of \$4,400. However, the \$4,400 would have been counted as income to Susan. Because she is in the 25 percent federal tax bracket, she would have paid \$1,100 in federal income taxes ($\$4,400 \times 25\% = \$1,100$) and because she is in the 6.9 percent state income tax bracket she would have paid \$304 in Montana income taxes ($\$4,400 \times 6.9\% = \304). Susan received the whole estate inheritance tax and federal estate tax free – so there was no benefit for her to take the personal representative fee and lose a total of \$1,404 to state and federal income taxes.



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How Much Does an Attorney Get Paid?

If a personal representative hires an attorney to handle legal aspects of the settlement of the estate, the attorney's compensation can not exceed one and one half times what was allowable to the personal representative. In the previous example the attorney would be allowed a fee of \$6,600 ($\$4,400 \times 1.5 = \$6,600$). Many attorneys now charge on an hourly fee basis rather than the percentage maximum. The fee is often less with the hourly fee method.

Personal Representative: An Important Role

A personal representative serves a very important function in the settlement of an estate. In general, a personal representative settles and distributes the estate of the decedent according to the terms of any valid will and the Montana Uniform Probate Code as quickly and efficiently as is consistent with the best interests of the estate. The selection should be made with careful consideration given to capabilities.

Disclaimer

This publication is not designed as a substitute for legal advice. Rather, it is designed to help people become better acquainted with some of the devices used in estate planning and to create an awareness of the need for such planning. Future changes in laws cannot be predicted and statements in this MontGuide are based solely on the laws in force on the date of publication.

Acknowledgements

The Business, Estates, Trusts, Tax, and Real Property Law Section, State Bar of Montana has approved this MontGuide and recommends its reading by all Montanans.

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