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## What is a Personal Representative?

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## WHAT IS A PERSONAL REPRESENTATIVE?

ADAPTED FOR SOUTH DAKOTA AUDIENCES BY DAVID REZAC, SCHOOL OF LAW GRADUATE STUDENT, UNIVERSITY OF SOUTH DAKOTA, ANNE MARIE FEIOCK, J.D., YOUNG LAWYERS SECTION PRESIDENT, SOUTH DAKOTA BAR ASSOCIATION, AND ELIZABETH E. GORHAM, PHD, AFC, ASSOCIATE PROFESSOR AND EXTENSION FAMILY RESOURCE MANAGEMENT SPECIALIST, SOUTH DAKOTA STATE UNIVERSITY, WITH PERMISSION OF MONTANA STATE UNIVERSITY, AUTHOR MARSHA A. GOETTING, PHD, CFP®, CFCS, PROFESSOR AND EXTENSION FAMILY ECONOMICS SPECIALIST, MONTANA STATE UNIVERSITY.

**WHEN A PROPERTY OWNER** dies, with or without a will, South Dakota law provides legal procedures for settling his or her estate. If probate is required, the process takes place under jurisdiction of the circuit 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. With this process, documents are filed with the Registrar of Deeds in the county where the jointly owned property is located. For more information about probate, ask for the Probate fact sheet.

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

This guide 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) only names or nominates a personal representative in a will. The circuit court 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 circuit court judge or clerk of courts 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 South Dakota Uniform Probate Code. The order is the following: surviving spouse, who is a devisee (named in the will) of the decedent; other devisees of the decedent; surviving spouse of the decedent; other heirs of the decedent; and any other qualified person. In performing his or her duties, a personal representative must follow procedures in the South Dakota Uniform Probate Code.

A personal representative must be 18 or more years of age. A South Dakota 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 Brookings and serve as a personal representative in Sioux Falls. Or, he or she may be a resident of another state, such as Wyoming, and still serve as personal representative in South Dakota.

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 that is qualified to do trust business or exercise trust powers in SD. 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, estate, and inheritance 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. South Dakota 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, a majority 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.

### 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 circuit court judge or clerk of court then appoints another personal representative according to the order listed in the South Dakota Uniform Probate Code.

### IS BOND REQUIRED OF A PERSONAL REPRESENTATIVE?

It depends. Generally, a bond, equal to the value of the estate of the decedent is required of a personal representative under certain circumstances to protect the estate. However, a bond is not required if: 1) the will waives bond, 2) the heirs waive bond, 3) the personal representative is a bank or trust company or 4) the court determines it would not be in the best interests of the estate.

### 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 South Dakota 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) and to the State Department of Social Services in Pierre within 14 days of appointment. No later than 14 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 and/or required.
- Notify decedent's life insurance companies.
- Pay expenses for last illness, funeral and burial expenses, and other debts.



- Prepare and make available an inventory of all of decedent's property within 6 months of appointment or 9 months of death, whichever is later. The personal representative may employ a qualified and disinterested appraiser(s) to assist in ascertaining the fair market value, as of the date of the decedent's death, of any asset the value of which may not be readily ascertainable. The names and addresses of any appraiser shall be indicated on the inventory with the item or items appraised.
- Publish a notice to creditors for debts of which the personal representative may be unaware. However, this is not required.
- Prepare and file federal estate tax returns if the estate is subject to estate tax.
- Prepare and file 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), 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. 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 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 South Dakota and federal taxation purposes. The South Dakota Uniform Probate Code gives guidance on the amount of compensation that may be paid without a court order. The compensation must be reasonable. The Code provides a list of factors used to determine reasonableness including, but not limited to, the time involved, the difficulty of the task, and the skill of the person performing the services.

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 reasonable 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 other heirs 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 tax bracket. Under South Dakota law there are no inheritance taxes and the estate tax only applies if the estate exceeds 1.5 million. Thus, they can receive their share without any taxation.

**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. Since she is in the 15 percent tax bracket, she would have paid \$600 in federal

income taxes ( $\$4,400 \times 15\% = \$660$ ). As an heir/devisee she would receive the whole estate inheritance and estate tax free, so there was no benefit for her to take the personal representative fee.

### 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 South Dakota 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.

### REFERENCES

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### 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 fact sheet are based solely on the laws in force on the date of publication.

### ACKNOWLEDGEMENTS

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This publication is suggested for the reading of all South Dakotans. It has been reviewed and approved by the South Dakota Bar Association and South Dakota State University faculty in the Human Development, Consumer and Family Sciences Department, College of Family and Consumer Sciences, March 2005.

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