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FAMILY FINANCIAL MANAGEMENT

MT199008HR, CURRENT AS OF 9/21

Personal Representative Responsibilities in Montana

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This publication outlines the duties and responsibilities of a personal representative in settling an estate in Montana (often termed 'executor' in other states).

WHEN A PROPERTY OWNER DIES, with or without a will, Montana statutes provide legal procedures for the settlement of the estate. If the deceased had assets requiring probate, the process takes place in the district court in the county where the deceased lived. In Montana, the individual who initiates a probate is a *personal representative (PR)*. For more information about probate, request the MSU Extension MontGuide, Probate in Montana (MT199006HR).

If the deceased held all real and personal property as a joint tenant with right of survivorship, probate is unnecessary. Instead, for **real** property a much shorter process called termination of joint tenancy occurs. For more information about the termination of a joint tenancy for real property, see MSU Extension MontGuide *How to Transfer Real Property in a Joint Tenancy or in a Life Estate Without Probate* (MT201606HR). The surviving joint tenant can file a termination of joint tenancy form with the clerk and recorder in the county where the real property is located. Download the termination of joint tenancy form here <https://www.montana.edu/estateplanning/affadavittoterminejointtenancyform.pdf>. This MontGuide provides a general outline of the duties and responsibilities of a PR during the settlement of an estate in Montana. The MontGuide does not cover all details for the many tasks a PR performs. Some responsibilities are common to every estate; others will depend on the complexity of the estate and the type of assets owned by the deceased.

Who should be the personal representative?

Under Montana law, if an estate requires probate, a person must administer the settlement of the estate. A family member, friend, bank, or trust company can serve as the PR. The best choice for the situation depends upon the people and circumstances involved. Consider your estate planning objectives and the consequences of each of the possible choices before selecting a PR.

If you make a will, you may nominate the person to administer the settlement of your estate. A testator (*the person writing a will*) only **nominate**s a PR in a will. The clerk of court or the judge makes the appointment. In performing duties, a PR must follow procedures provided in the Montana Uniform Probate Code.

If you do not nominate a PR in your will, or if you die without writing a will, the court will appoint one to settle your estate. The order of priority in which eligible persons may apply for appointment as a PR, is below:

- Surviving spouse named in the will to receive property of the deceased.
- Custodial parent of a deceased minor.
- Other persons named in a will to receive property of the deceased.
- Surviving spouse of the deceased.
- Parent of an adult deceased person survived by children or grandchildren, none of whom is an adult.
- Other heirs of the deceased.
- County public administrator.

Most people in Montana choose a family member to be the PR. Usually, family members are familiar with your property. Often, family members will not charge for serving as PR or will charge less than a non-family member.

Each family has its own dynamics, however. Family members may lack the financial experience to administer an estate. Some family members may be extremely busy with their own families or work. They may not have time to serve as PR. Still other families include beneficiaries who do not get along well with one another. For this reason, consider a friend or a corporate entity, such as a bank or trust company, to be your PR.

When considering a friend to function as PR, the same factors come into play:

- Is the friend familiar with your property?
- What fees will the friend charge the estate?
- Does the friend have sufficient financial experience?
- Does the friend have plenty of time to administer the estate?

- Do all the estate beneficiaries respect the friend? Or, would some beneficiaries perceive the nomination of the friend as “unfair”?
- Will the nomination intensify conflicts among beneficiaries?

The answers to some of these questions may result in considering a bank or trust company to serve as PR. Most trust companies, and some banks, have substantial experience handling estates. That experience may overcome any unfamiliarity with your property or the dynamics of the beneficiaries’ relationships. In addition to experience, banks and trust companies have contacts and business judgment beyond those of a single individual.

Below are questions to ask of banks and trust companies:

- Are they willing to serve as PR, given the amount and nature of your assets and family dynamics? For example, banks and trust companies usually have a minimum value for any estate they will oversee. Further, some companies are reluctant to administer an estate that includes real property.
- What is the approximate amount of fees the bank or trust company will charge for serving as a PR?

If you want to nominate a family member or friend to be your PR, inform the person chosen. Explain your estate planning goals and how you expect the PR to honor your wishes before the nomination appears in your will. You may find the person you selected does not want to take on the responsibility. If so, you will have to choose someone else who is willing to assume the duties of being the PR. Furthermore, a family member or friend may die before you do. For this reason, you will want to name an alternate or successor PR.

May more than one person serve as personal representative?

Yes. Montana law provides for the appointment of co-PRs. You may want a member of the family to serve as PR but believe a bank or trust company could manage certain business aspects of the estate more efficiently. You may name the family member and the bank or trust company as co-PRs in the will.

Another possibility is to appoint two of your family members. When two persons are co-PRs, both must agree on important matters relating to the estate unless the will provides otherwise. This action may reassure family members they will have their say in making decisions concerning the estate. On the other hand, if both cannot agree on a decision, one or both may need to seek a court resolution of the matter.

Furthermore, when there are two or more co-PRs, all of them must sign papers relating to the administration and distribution of the estate. This can be very time consuming and cumbersome when the PRs live in different towns, states or even another country.

How does a person apply for appointment as a PR?

Montana statutes require that an application for appointment as the PR must include the applicant’s notarized signature. The applicant acknowledges that the PR is a fiduciary and has obligations to the deceased’s estate. Also, the applicant recognizes that none of the property or other assets of the decedent’s estate is to be used for the PR’s own personal benefit. A form containing these fiduciary relationship statements is available online at www.montana.edu/estateplanning/acknowledgementoffiduciaryrelationship.pdf.

Must the nominated personal representative accept the appointment?

No. If the PR nominated in the will does not want to serve, the person can reject the appointment. The person must send a written rejection to the court. If two or more persons have an equal right to be a PR, then those not applying to be a PR may file a renunciation with the court at the time of the filing of the application for appointment.

What are the responsibilities of a personal representative?

In general, a PR distributes the estate as indicated by the will of the deceased and in accordance with the Montana Uniform Probate Code as quickly and efficiently as is consistent with the best interests of the estate. To accomplish this, the PR will need to complete the following tasks:

- Honor the deceased’s written instructions about body disposition, funeral, memorial service, and burial arrangements.
- Arrange for the immediate needs of surviving family members.
- Locate the will and other important papers.
- Make application for appointment as PR.
- File paperwork to probate the will.
- File the appropriate form to terminate a joint tenancy on real property.
- Secure and safeguard valuable property such as a residence, jewelry, etc.
- Give legal notice of PR appointment to heirs (no will) and devisees (beneficiaries named in a will).
- Notify life insurance companies in which the deceased had policies.
- Close credit card accounts.
- Open an estate checking account for paying expenses for last illness, funeral and burial expenses, and other debts.
- Deposit or invest liquid assets of the estate in an interest-bearing account.
- Prepare an inventory of all the deceased’s real and personal property.

- Have real property and valuable personal property or collectibles appraised to establish value.
- Publish a notice to creditors in a local newspaper.
- Prepare and file a federal estate tax return if the estate owes an estate tax. (During 2021 the amount exempted from the federal estate tax is \$11.7 million for a single person; \$23.4 million for a married couple).
- Prepare and file Montana and federal income tax returns for the decedent's last year of life and, if necessary, for the estate.
- Determine which estate assets to use for paying probate administration expenses and other costs of settling the estate.
- Fulfill charitable gifts and other specific gifts as indicated in the deceased's will.
- Determine the values at date of death for all the deceased's bank or credit union accounts and securities (stocks, bonds, mutual funds).
- Distribute assets to devisees as indicated in the deceased's will, or if the deceased had no will, to heirs as required by the intestacy statutes in the Montana Uniform Probate Code.

These are only a few of the numerous duties for which a PR is accountable. The complexity of the deceased's estate will determine other responsibilities.

May a PR request reimbursement for expenses incurred while settling the estate?

Yes. A PR can request reimbursement from the estate for legitimate and reasonable expenses incurred in the process of settling the estate. For example, a PR may need to obtain certified copies of the death certificate to send to the Social Security Administration for the purpose of stopping benefit payments. A PR may also need death certificates to send to insurance companies to claim life insurance benefits or to an employer to begin survivor benefits or adjust pension payments.

A PR can also request reimbursement for expenses paid prior to opening the probate. For example, the PR may have paid for cremation, funeral, and memorial services or paid a retainer to an attorney for opening a probate. Other costs the PR may encounter include: initial fee to begin the probate, cost of copying papers in the court's file, publication cost of the notice to creditors in a newspaper, appraisals on real property, sale expenses for any auctions or property sales, insurance premiums, postage and travel costs associated with managing the estate.

If the PR establishes an estate checking account, these costs can be paid directly out of the account. In this case no reimbursement would be necessary. Regardless of the reimbursement method used, the PR should keep detailed records in case the court, the Internal Revenue Service, or the estate's beneficiaries request a justification of the PR's expenses.

How much may a personal representative charge for settling an estate?

A PR is entitled to compensation for services. The fee is ordinary income for Montana and federal income taxation purposes. In other words, the PR reports the fee on the personal income tax returns submitted to the Montana Department of Revenue and the Internal Revenue Service.

Prior to 2020, Montana statutes set a maximum fee based on the value of the estate passing through probate. The calculation for the maximum fee was three percent of the first \$40,000 in value of the estate and two percent for the remaining balance over \$40,000. This resulted in PRs in some counties of the state always charging the maximum, even if the amount of work did not justify this expense. The Montana Supreme Court rejected this practice. See *In the Matter of the Estate of Robert E. Stone*, 236 Mont. 1 (1989) <https://cite.case.law/p2d/768/334/>.

In 2019, the Montana Legislature eliminated the maximum percentage fee based on the value of the estate's assets. The statute now says PR fees must be "reasonable." The court considers the following factors to determine "reasonableness" of a fee.

- Nature of the work involved, which includes time, effort, difficulty, and skills required.
- Compensation customarily charged in the community for similar services.
- Experience and capabilities of the PR.

A PR should keep a record of the time devoted to settling the estate: what, where and how much time was spent on each task. Montana law authorizes the PR to employ persons, including attorneys, accountants, appraisers, and investment advisors to assist with settling the estate. Also, existing law allows an estate beneficiary to challenge the reasonableness of the PR's compensation and the fees charged by persons employed by the PR.

The PR may renounce right to all or any part of the compensation before appointment. Surviving spouses and adult children often waive their fee for serving as PR for two reasons. One is to save the estate money so more passes to the estate's beneficiaries. The second reason is the PR must declare the fee as income and pay state and federal income taxes on the amount.

Example 1: Susan was PR for her mother's \$200,000 estate. Her records indicate \$3,000 would be a reasonable fee. However, the \$3,000 fee would result in additional taxable income to Susan. Because her marginal federal rate is 22 percent, she would have paid \$660 in additional federal income taxes ($\$3,000 \times .22 = \660). And, because her marginal Montana income tax rate in 2021 is 6.9 percent, she would have paid \$207 in additional Montana income taxes ($\$3,000 \times 0.09 = \207). Susan, as the only beneficiary, received her mother's estate inheritance tax and federal estate

tax free – so there is no benefit for her to take the PR fee. Susan would lose \$867 (\$660 federal income tax + \$207 Montana income tax = \$867) to pay for the additional state and federal income taxes if she accepts a \$3,000 PR fee.

Attorneys often recommend that PRs take a fee if they are not the sole beneficiary of the estate. As PRs have often discovered, performing the tasks to settle an estate is often a thankless job which takes a lot of time and effort. They may have to take time off work to file necessary papers with the court. Sometimes they do the PR work in the evenings and on weekends.

Example 2: Etta nominated her oldest daughter, Emily, as the PR of her estate because her other two daughters lived out of state. After Etta's death the out-of-state daughters kept pestering Emily to get the estate settled so they could get "their inheritance." They called Emily late in the evenings. They ranted at her on the weekends to "hurry up." Emily's attorney recommended she keep track of her time spent settling the estate and the time on the phone with her sisters. The attorney also suggested she charge the hourly billable rate where she is employed, \$40 an hour.

How much may an attorney charge for settling an estate?

If a PR hires an attorney to manage legal aspects of the settlement of the estate, the attorney's compensation also must be "reasonable." Prior to October 1, 2019, the maximum fee was one-and-one-half times what was allowable to the PR. This resulted in some attorneys in some counties of the state always charging the maximum amount, even though the amount of work did not justify the fee. As with the PR fee, the Montana Supreme Court rejected this practice. *See In the Matter of the Estate of Robert E. Stone*, 236 Mont. 1 (1989) <https://cite.case.law/p2d/768/334/>

The Montana Supreme Court has listed factors applicable to the determination of a reasonable attorney's fee for administering an estate. The Rules of Professional Conduct, which govern the

conduct of lawyers, also provides guidelines for setting legal fees. Thus, the court could consider the following items to determine a "reasonable" fee:

- the time spent by the attorney,
- the nature of the service rendered,
- the professional skill and experience required for administering the estate, and
- the attorney's character and standing in the profession.

Personal Representative: An Important Role

A PR serves an important function in the settlement of an estate. In general, a PR pays taxes and creditors and then distributes the estate of the deceased according to the terms of the deceased's valid will and the Montana Uniform Probate Code. When selecting a person to perform the responsibilities of a PR, carefully consider the capabilities of the person or entity to accomplish the tasks necessary to settle your estate.

References

Hiring an Attorney FAQ. Downloaded on November 9, 2020 at <https://www.montanabar.org/page/AttorneyFAQs/Hiring-an-Attorney-FAQs.htm>

Disclaimer

This publication is not substitute for legal advice. Rather, the intent is to help Montanans become better acquainted with some of the duties of PRs. Future changes in laws may be made by the Montana legislature. 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 reviewed this MontGuide and recommends its reading by Montanans who are considering applying for the appointment of a PR or those who have been appointed to serve as a PR for an estate.



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(ESTATE PLANNING)**

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