



YOUR DUTIES AS PERSONAL REPRESENTATIVE

Guidelines for Executors and Administrators

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REMINDER: *A personal representative is a court-appointed “fiduciary” who manages the estate of a deceased person. The term “fiduciary” refers to someone who is acting in a position of trust for the benefit of others. As a fiduciary, a personal representative is held to a high standard of integrity, ethics, and accountability. This memo was prepared to give an overview of a personal representative’s — and to some extent a testamentary trustee’s — duties and responsibilities and to help him or her avoid the civil and criminal liability that can result from failure to comply with applicable state and federal laws. READ IT CAREFULLY! If you are ever uncertain as to what you may or may not do or what you should or should not do, consult with us.*

1. INTRODUCTION. This memo outlines the duties of an executor or administrator of a decedent's estate, and gives a simplified overview of the estate administration process. This is specifically for someone who has been officially appointed by the probate court to administer a decedent's probate estate¹ as an executor or administrator. In this memo, “you” refers to the court-appointed executor or administrator, and “we” refers to the law firm of The Rushforth Firm, PLLC, a Nevada professional limited-liability company doing business as The Rushforth Firm, Ltd. If you ever have a question about this memo or about what you should and should not do, please call us at (702) 255-4552.

1.1 Title. Nevada law uses the term “personal representative” to refer to the person appointed by the court to administer the estate and to distribute the estate pursuant to the terms of the Will or pursuant to the terms of the intestate succession laws.

(a) The term “personal representative” replaces references to:

(1) “Executor” (one who is nominated under a Will);

(2) “Administrator” (one who is named to administer an estate where there is no Will); and

(3) “Administrator with the Will annexed” (who is appointed as administrator when the decedent left a Will but either did not name an executor in the Will or the named executor fails or ceases to serve.²).

(b) If the Will creates a testamentary trust (as discussed in subsection 5.7 of this memo), you may also have the title of “trustee”.

1.2 Persons Serving Jointly. Two or more persons may be appointed to act as co-personal representatives (i.e., co-executors or co-administrators). Unless the decedent's Will specifically provides otherwise, when more than one personal representative is serving, action is taken either by majority vote or with court approval. For the purposes of this memo, the singular term “personal representative” is used to refer to all executors or administrators appointed by the court.

¹The “probate estate” consists of all assets belonging to the decedent which do not pass to other persons or entities by operation of law (such as assets held in joint tenancy or in a living trust) or by operation of contract (such as life insurance).

²The female forms, “executrix” and “administratrix”, are sometimes used in court documents, but I hope that no one is offended if we do not use them in this memo.



1.3 Official Appointment; Issuance of “Letters”. A personal representative has no authority until officially appointed by the probate court. Even if you are named as executor in the decedent's Will, you have only been nominated; your official appointment comes only by court order. When you are authorized to act as executor or administrator, you will be given “Letters Testamentary” (for an executor) or “Letters of Administration” (for an administrator), and “Letters of Administration with the Will Annexed” (for an administrator with the Will annexed). Keep in mind that many actions taken by a personal representative require specific court authorization even after the personal representative has been officially appointed by the probate court.

1.4 Estate Administration. Generally, your task, as personal representative, is to:

- (a) Collect all assets³ belonging to the decedent;
- (b) Manage and invest assets;
- (c) Pay taxes, debts and other expenses; and
- (d) Distribute the remaining estate to the devisees or heirs⁴.

1.5 Powers. As personal representative you have very few general powers. Most actions must be authorized by the probate court. You cannot assume that you can take action without court approval because the Will says so. Even if you have the power to take certain actions, getting prior court authorization may be advisable if the action will cause controversy among the heirs or Will beneficiaries.

- (a) After your official appointment, you may, without further court authority:
 - (1) Collect the decedent's personal property and place them in your possession⁵;
 - (2) Collect the decedent's cash and cash accounts and place them in one or more federally-insured accounts in your name as executor or administrator for the estate;
 - (3) Keep real estate in good “tenantable” repair, and rent out the property for periods of less than one year.
 - (4) Collect interest, dividends, rents, and other income due the decedent, to be deposited in federally-insured accounts belonging to the estate in your name as executor or administrator.
- (b) **Unless previously authorized by the probate court, you should NEVER:**
 - (1) Do anything in the estate's behalf before “Letters” are issued by the probate

³In legal terminology, the words “property” and “assets” are used interchangeably. Real property outside of Nevada is not subject to the jurisdiction of the Nevada courts, and local legal counsel should be retained where such real property is located.

⁴Nevada law defines “devisees” to refer to beneficiaries under the decedent's Will whether they receive real and/or personal property. “Heirs” are those entitled to a decedent's assets to the extent not distributed under the terms of a valid Will under the state's intestate succession statutes [NRS Chapter 134].

⁵See section 3 of this memo.



court;

- (2) Carry on the decedent's business or perform the decedent's contracts;
- (3) Make any contracts or agreements binding on the estate;
- (4) Sell, lease, abandon, or give away estate assets⁶;
- (5) Borrow money; sign a promissory note, mortgage, trust deed, or other lien document affecting estate property.
- (6) Distribute estate property to a beneficiary;
- (7) Act without the consent of any co-executor or co-administrator (or a majority of such, if there are more than two);
- (8) Pay any debt or claim against the estate⁷; or
- (9) Sign a release or otherwise compromise any debts or claims against the estate;

(c) Under Nevada law, you can NEVER:

- (1) Deposit estate funds into a personal account;
- (2) Place estate assets into a personal safe deposit box;
- (3) Co-mingle the assets of the estate with those of any person;
- (4) Take title to assets in your own name without reflecting your capacity as an executor or administrator;
- (5) Distribute assets to a beneficiary without prior court approval.

1.6 Court Hearings. Anytime we submit a petition to the court, the court will assign a hearing date. Routine matters are set for Fridays at 9:30 a.m., and a notice must be sent at least 10 days before the hearing by mail to the heirs and/or Will beneficiaries and any interested persons (such as creditors) who have requested notice. *Unless a petition or motion is contested, you will not usually need to attend the court hearings.* If you want to attend, be sure to let us know in advance so that we can accompany you to the courthouse or meet you there.

- (a) Most matters in a probate case are decided by the “probate commissioner”, whose decision is confirmed by an order of the probate judge.
- (b) When an issue is disputed, the probate commissioner’s decision is often submitted to the probate judge in the form of a “report and recommendation”, which the judge

⁶See subsection 3.5 regarding court approval for sales.

⁷Funeral costs and the expenses of the decedent's last illness can be paid without prior court authorization IF there are clearly enough funds to meet all of the estate's obligations, the creditors' claim period has expired, and the claimant has filed a verified claim with the probate court.



can either affirm or reverse with a court order. In most cases, a separate hearing before the judge occurs before the judge makes a decision to affirm or reverse the decision of the probate commissioner.

- (c) Some court orders are subject to appeal to the Nevada Supreme Court, but the appeal must be filed within 30 day after a “Notice of Entry of Order” is given.

2. PROBATE OVERVIEW. The probate process can be summarized as follows (with an asterisk “*” indicating steps that may not be required for all estates):

2.1 *Open Safe Deposit Box. Any interested person may file a petition for authorization to open a safe deposit box and remove the decedent's Will, if any.

2.2 *Special Administration. If there will be a delay in getting a regular executor or administrator appointed or if there is a special urgency, a qualified person can file a petition for appointment of a special administrator.

2.3 Petition for Appointment of Personal Representative. The person or persons entitled by law or under the Will to be appointed administrator or executor files a petition to be appointed. If there is a Will (or a Will and codicils), the same petition asks the court to admit the Will (and any codicils to probate). A “Notice of Hearing” with respect to this petition is mailed to all heirs and Will beneficiaries. The notice can also be given by publication in a newspaper if a person's address is unknown.

2.4 *Contest. Heirs and Will beneficiaries may file a “contest” opposing the probate of the Will and/or the appointment of the petitioner as administrator or executor. No distributions from the estate will be made until the contest is resolved.

2.5 Court Hearing on Petition for Appointment. There is a court hearing on the petition for appointment of the personal representative. Unless there is a contest, it is routine for the personal representative to be appointed at that hearing.

2.6 Estate Administration. The estate-administration period begins when the court grants the order formally appointing the personal representative and ends when the court issues an order formally discharging the personal representative. During the estate-administration period:

- (a) A notice to creditors is published. It is also mailed to known creditors except to creditors whose claims are undisputed. The creditors' claim period is 90 days unless summary administration is allowed, in which case there is a 60-day creditors' claim period.
- (b) The personal representative obtains appraisals, gathers assets, and prepares an inventory of the estate. The inventory contains a list of all assets and their respective values (as of the decedent's date of death).
- (c) The personal representative pays federal taxes⁸ and other priority claims and reviews other non-priority claims.
- (d) The personal representative makes sure that all estate property is properly protected

⁸Federal taxes are discussed in section 4 of this memo.



and prudently invested⁹. As needed, the personal representative petitions for instructions, for confirmation of the sale of assets, for authorization to continue or conduct businesses, and for permission to make specific investments.¹⁰

2.7 First Accounting. Upon conclusion of the creditors' claim period, the administrator or executor files an accounting¹¹ and, in conjunction therewith, approves nonpriority claims and petitions for authority to pay such claims. If the estate is ready for final distribution, the first accounting can also be the final accounting. If the estate is not ready for final distribution, the petition can include a petition for a partial distribution. If distributions are approved, the personal representative makes the approved distributions and obtains receipts from the distributees.

2.8 Explaining Why An Estate Is Not Closed. After six months (or 15 months, if an estate tax return is required), the administrator or executor files an explanation why the estate is not closed.¹²

2.9 Annual Accountings. An accounting¹³ is required annually until the court orders the final distribution.

2.10 Final Accounting; Decree of Final Distribution; Final Discharge. When a final accounting has been filed, a petition is filed requesting approval of the final accounting and a decree of final distribution. After the court orders a final distribution:

- (a) The personal representative makes the approved distribution of the estate's assets and obtains receipts.
- (b) Upon the filing of all distributees' receipts, the court issues an order of final discharge.

3. COLLECTION AND MANAGEMENT OF ASSETS. After you are a court-appointed personal representative, you must take possession of the decedent's assets.

3.1 Protecting Assets; Limiting Liability.

- (a) Securities (especially bearer bonds), jewelry, and other items of substantial value should be kept in a safe deposit box. Please let us know if there are any items you think should remain, or be placed, in the possession of another person.

⁹The standard for making investments is discussed in subsection 3.4 of this memo.

¹⁰Asset management and other aspects of estate administration are discussed more completely in section 3 of this memo.

¹¹Accountings are discussed further in section 5 of this memo.

¹²The Nevada legislature has indicated a desire to have all probate cases closed within six months. Unfortunately, if federal estate taxes are involved, the IRS has at least 18 months from the date of the decedent's death or nine months from the filing of the federal estate tax return (IRS form 709) to evaluate the estate tax return. For that reason, where an estate tax return is required, it is common for the estate to be open for at least 18 months or even longer.

¹³Accountings are discussed further in section 5 of this memo.



- (b) Accounts at financial institutions¹⁴ in which the decedent had an interest should be given early attention. The balance of each account should be transferred into a federally-insured estate account, registered something like this: “*JAMES DOE, Executor of the Estate of JOHN DOE*”. The estate should have its own tax identification number, which we can help you apply for at your request. Outstanding checks made by the decedent should be itemized and, in most situations, honored. Accounts owned by the decedent as a joint tenant with another named person do not belong to the estate; and the surviving joint tenant has the legal right to collect the account. Accounts for which a beneficiary was designated are payable to the beneficiary unless the Will revokes the beneficiary designation.
- (c) The proceeds from life insurance and other death benefits are payable to the designated beneficiary or beneficiaries. Unless the estate is the beneficiary or designated beneficiaries are all deceased, such benefits are not assets of the probate estate. If the estate is the appropriate recipient, the appropriate benefit claim form should be obtained, completed, and submitted as soon as reasonably possible.
- (d) All credit cards issued solely in the decedent's name should be cut, and the pieces should be returned to the issuer promptly with a request to cancel the account. If there is a joint account holder, advise each credit card company of the date of the decedent's death and let it know that the surviving account holder will be solely responsible for any charges made thereafter. Please advise us of any action you take.
- (e) Estate assets should be adequately insured against damage, theft, loss, and personal injury claims. Be sure to contact all insurance companies involved to make sure existing policies continue in force after the decedent's death. You may need to replace existing policies, or the estate -- or you as personal representative -- may need to be added as an insured on a rider to existing policies. It is appropriate for you to evaluate insurance policies and to select the coverage and insurance company that provides the appropriate coverage that the estate can afford. You may be held personally liable for losses that should have been covered by insurance but are not.

3.2 Inventory. One of your first responsibilities as personal representative is to ascertain the decedent's assets and make an inventory of them. The inventory must be filed with the court, and must include a value for each item (valued as of the decedent's date of death). Bank accounts, publicly-traded securities, and vehicles listed in the “blue book” can be listed without a formal appraisal, but we will have to explain to the court how you arrived at the value. Real estate, valuable jewelry, and other special collections should be appraised by an independent appraiser, whom you may select. We can help you select appraisers if you do not know any who are qualified and whose fees are reasonable. There are circumstances in which a formal appraisal is not required, and we can discuss whether or not those exceptions apply to your situation. The value shown on the inventory should show encumbrances and should reflect the net value of each asset¹⁵ using date-of-death values. If a federal estate tax return (IRS Form 706) is required, the values on the probate inventory and the values on the estate tax return should be identical unless the inconsistency is explained.

3.3 Record Keeping. You *must* keep an exact record of all receipts and disbursements. Your records should reflect the source of each receipt, and should indicate whether it represents

¹⁴Such as national and state banks, federal savings banks (savings and loan associations), credit unions, thrift companies, etc.

¹⁵The “net value” is the gross value of the asset less the value of any known liens or encumbrances, including mortgages and other liabilities. The inventory should reflect the net value and how it was calculated.



principal or income¹⁶. Court accountings and distributions are discussed in section 5, below.

3.4 Withdrawals; Investments. Without first consulting us, you should not write any checks or make withdrawals. The personal representative makes sure that all estate property is properly protected and prudently invested.

- (a) Nevada law prohibits fiduciaries from making speculative investments. NRS 164.745 requires that a fiduciary “invest and manage trust property as a prudent investor would”.
 - (1) Your “decisions concerning investment and management as applied to individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as part of an overall strategy of investment having objectives for risk and return reasonably suited” to the specific needs of the estate and its beneficiaries.
 - (2) Under Nevada law, in making investments, you must take into consideration: “(a) General economic conditions; (b) The possible effect of inflation or deflation; (c) The expected tax consequences of decisions or strategies; (d) The role that each investment or course of action plays within the overall trust portfolio; (e) The expected total return from income and the appreciation of capital; (f) Other resources of the beneficiaries; (g) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and (h) An asset’s special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.”
- (b) You may transfer cash into any federally-insured account or into direct obligations of the United States which mature in one year or less; other investments can be made only with prior court approval.

3.5 Selling Estate Assets. It may be necessary to sell estate assets to avoid depreciation loss, to raise cash needed for expenses, or to comply with the terms of the Will. Probate sales are subject to many technical rules, and you should NOT make any arrangements for the sale of assets without first consulting us. If you sell an asset at an unreasonably low price, you will be personally liable for the difference between what you should have sold the asset for and the price the estate actually received.

- (a) Generally, some types of assets should not be put up for sale without prior court authority. This would include property that is specifically gifted to someone under the terms of the decedent’s Will and marketable securities.
- (b) Other assets, such as real property, can be put up for sale and the terms of the sale negotiated, but title should not be transferred until the court confirms the sale or the requirements of the independent administrations of estates act have been satisfied.
 - (1) If court confirmation is required, any agreement to sell the property should contain a provision that reads something like this:

¹⁶“Principal” refers to all assets, such as a bank account, stock, car, home, and the like. “Income” refers to revenues generated from the principal, including interest, dividends, rent, royalties, and the like. Income also includes compensation for the decedent’s personal services, such as salary and bonuses. Some payments may include income and principal, such as a mortgage payment which represents both interest and principal.



"Notwithstanding anything herein to the contrary, this property is being sold from the estate of a decedent and is subject to the requirements of Chapter 148 of the Nevada Revised Statutes with respect to the sale of [real or personal] property, including the requirement that the sale be confirmed by the probate court (the Eighth Judicial District Court in Clark County, Nevada, Case No. P 12345)."

- (2) If the court has approved full authority under the independent administration of estates act, any agreement to sell real property or a business interest should contain a provision that reads something like this:

"Notwithstanding anything herein to the contrary, this real property [OR business interest] is being sold from the estate of a decedent and is subject to the requirements of Nevada's Independent Administration of Estates Act (in Chapter 143 of the Nevada Revised Statutes), which includes the requirement that all interested persons be given a notice of the proposed action and an opportunity to object. The estate is not obligated to sell the real property [OR business interest] unless no interested person objects or unless the sale is confirmed by the probate court (the Eighth Judicial District Court in Clark County, Nevada, Case No. P 12345)."

- (3) Once the terms of the sale have been agreed upon, the agreement must be submitted to the court for confirmation or a "notice of proposed action" must be given to all "interested persons", including heirs or beneficiaries and creditors. If it is likely that a beneficiary, heir, or creditor will object, it will be more efficient to petition for confirmation of the sale rather than give a notice of proposed action.

(A) If a Will has been admitted to probate, an heir who has been left out of the Will is not entitled to notice.

(B) A notice is not required to be given to an interested person who signs a written consent to the proposed sale.

(c) Depreciating assets, perishable items, and assets that will incur a loss or expense if not sold promptly can be sold without prior court authorization. Even so, you are responsible for the true value of the assets, regardless of the sale price. If there is a potential for a dispute, you may ask the court to approve the sale retroactively.

(d) Sales of marketable securities can be sold for the market price if prior court authorization is obtained. A confirmation of the sale is not required.

(e) Selling real property requires several steps. Expecting a quick sale of real property from an estate is unrealistic.

- (1) Notice of the sale must be published in a newspaper for three consecutive weeks unless the Will specifically authorizes or directs the sale of the property. The notice of sale will specify a sale date, or rather a date by which offers should be submitted. You should not sign any agreement to sell the property until after the date specified for the sale has passed.



- (2) After the notice period has expired an agreement can be made “subject to confirmation by the probate court”. Although it is not required, it is also wise to avoid fixing a specific date for the closing of escrow. In addition to the language mentioned in subparagraph 3.5(b)(1), real estate “offer and acceptance” forms should contain something like this: “*Escrow shall close within seven days after confirmation by the probate court.*” If the purchaser asks for it, a provision might be included that requires you to use “*reasonable efforts to obtain that confirmation within a reasonable time.*”
- (3) A petition for confirmation of the agreed upon sale must be filed, notice given to the heirs or Will beneficiaries, and a hearing set at least ten days after the notice is given. As of the date of this memo, probate hearings for this type of petition are always scheduled for Fridays at 9:30 a.m. unless Friday is a court holiday.
- (4) An appraisal made within one year is normally required by law, but there are some exceptions.
- (5) At the hearing, the court will ask for additional bids on the property. Another bidder must increase the bid by the lesser of \$5,000 or 5 % (whichever is less) in order to prevail. Even if there are no higher bids, the judge has the discretion to refuse to confirm the sale if he or she determines that the sale is not in the estate's best interests.
- (6) Escrow on the sale can close any time after the court has confirmed the sale, but a certified copy of the court's order must be recorded prior to or as a part of the closing of escrow.
- (7) The deed you sign should be an “Executor's Deed” or an “Administrator's Deed”, but it should not contain any special warranties of title. It should only purport to convey the decedent's interest in the property. We recommend that you obtain title insurance for the buyer.

3.6 Borrowing Money; Mortgaging Property; Leases; Contracts. Court approval is required before you enter into any agreement that binds the estate, such as loans, mortgages, or leases (except for leases of one year or less). You must also petition the court for authority to carry out a contract made by the decedent or to compromise any claim of or against the decedent or the decedent's estate.

3.7 Disposing of “Junk”. You can dispose of items that are truly worthless, but the safest approach is to get prior court approval before disposing of anything. If you dispose of some old magazines, for example, and it turns out that a valuable comic book collection was included, you may be held liable to the estate for the value of the collection. Even with respect to worn out clothing and useless personal effects, you should at least confer with the heirs or beneficiaries to see if some of the items have sentimental value. In short, be sure to confer with us before disposing of anything but true trash.

3.8 Debts, Claims, Expenses. After your appointment, you will sign and we will have published a “Notice to Creditors” which puts creditors and claimants on notice that they have 90 days¹⁷ in which to file a claim. Known creditors should also be mailed a copy of the notice,

¹⁷If the estate is valued at less than \$200,000 AND the court allows Summary Administration, the creditors' claim period is 60 days.



so you must provide us with a list of known creditors at your earliest convenience. After the creditors' claim period expires, you will either approve or reject the claims. Approved claims are forwarded to the judge for authority to pay. If assets are insufficient to pay everyone, payments from the estate are made in the following order of priority:

- (a) Expenses of administration, including court costs, your fee as personal representative¹⁸, attorneys' fees¹⁹, and other costs associated with administering the estate.
- (b) Priority claims, including funeral costs, expenses of the decedent's last illness, certain wage claims, and taxes, including federal income, gift, and estate taxes.
- (c) General creditors²⁰.

3.9 Advisors. You may retain accountants and other advisors to help you make wise tax-planning and investment decisions. If extraordinary fees are anticipated, be sure to let us know so that we can obtain the proper authorization from the probate court. You are ultimately responsible for the entire estate, and you cannot delegate away that responsibility by hiring others to do your job. Also, if you hire someone to do the work of an administrator or executor, your compensation may be reduced by the fees you pay to have the work done.

4. FEDERAL AND STATE TAXES. You will be required to pay the decedent's federal taxes, including income, gift, estate taxes, and generation-skipping transfer taxes and to file the related tax returns. If the decedent was a nonresident of Nevada, or if the decedent had income from outside Nevada, or if you are a not a Nevada resident, you may also have to pay taxes imposed by another state or municipality. A number of IRS publications are available from the IRS outlining a fiduciary's responsibility with regard to federal taxes.²¹ You can obtain IRS forms, publications, and instructions online (www.irs.gov) or you can ask your accountant or us to obtain them for you.

4.1 Income Taxes. You will have to file the decedent's final income tax return (IRS Form 1040) and pay the taxes for the year of the decedent's death. If the decedent died before filing the income tax return for the prior year, you may have to file it and pay the applicable taxes as well. Income paid after the decedent's death belongs to the decedent's estate, and you will have to file a fiduciary income tax return (IRS Form 1041) for the estate and pay the income taxes, except with respect to income distributed to beneficiaries. You should make arrangements with a certified public accountant or other qualified tax return preparer to have the necessary returns prepared.

4.2 Federal Transfer Taxes. Any person who makes lifetime gifts or death-time transfers having a cumulative value equal to or less than the "applicable exclusion" for the federal gift and estate taxes does not incur a federal gift or estate tax.

¹⁸The compensation of an executor or administrator is set by law at 4% of the first \$15,000, 3% of the next \$85,000, and 2% of the balance. It is called a "commission" in the statute. If you have rendered extraordinary services to the estate, you may be entitled to receive additional compensation.

¹⁹Attorneys' fees are set by agreement between the personal representative (you) and the attorneys (us). After a fee arrangement is agreed upon, you are entitled to a written fee disclosure statement. Nevada law does not set a percentage fee for attorneys, and it is usually less expensive if you hire an attorney or firm that bills by the hour rather than charging a percentage fee.

²⁰Since the estate's assets are valued at their net value, a secured creditor's interest is not generally affected by estate administration.

²¹For example, IRS Publications 559 and 950. These publications explain the duties of an executor, but, whether or not you are appointed as the executor for the settlor's estate, a trustee may be considered the executor for federal tax purposes.



- (a) The applicable estate-tax exclusion is \$5 million for decedents who die in 2011 and will be adjusted annually for inflation each year thereafter.²² For persons dying in 2010, the Congress retroactively provided for a \$5 million exclusion, a 35% estate tax rate, and a fully stepped-up income tax basis; however, the executor²³ can elect to pay no estate tax and a limited stepped up basis for capital gain tax purposes. For large estates, an accountant should make the determination as to which option produces the least overall tax obligation.
- (b) A gift tax return is due for all gifts made other than annual exclusion gifts of \$14,000 per recipient per calendar year. No gift tax is actually due unless the cumulative gifts exceed the applicable exclusion for gift tax.²⁴
- (c) A federal estate tax return is due if the gross value of the decedent's estate²⁵ plus the net value of lifetime gifts (other than annual gifts of less than \$14,000 per recipient per year) exceeds the applicable exclusion. The estate tax rate depends on the date of death.²⁶ There are circumstances in which an estate tax return is required even though no tax will be due because of deductions and exclusions.
- (d) A generation-skipping transfer tax may also be due if transfers to grandchildren and other lower generations exceed the GST exemption.²⁷
- (e) If a gift or estate tax return is required, we would be happy to assist your accountant in the preparation of any required return if you wish.

4.3 Tax Forms and Publications. IRS Publication 559 is available from the IRS outlining a fiduciary's responsibility with regard to federal taxes, which is updated annually. You or your accountant can order Publication 559 and other needed tax forms and publications from the IRS by calling 1-800-TAX-FORM (1-800-829-3676). Most tax forms and publications are

²²Internal Revenue Code § 2010(c) provides for an "applicable exclusion", which is the cumulative amount that can pass free of estate tax. This is sometimes called "the exemption equivalent of the Unified Credit". The applicable exclusion for estate tax has been: \$625,000 in 1998; \$650,000 in 1999; \$675,000 in 2000; \$1 million in 2002 and 2003; \$1.5 million in 2004 and 2005; \$2 million in 2006, 2007, and 2008, \$3.5 million in 2009; \$5 million in 2010; and \$5 million in 2011 and beyond (adjusted annually for inflation). The applicable exclusion was adjusted to \$5.12 million in 2012, and \$5.25 million in 2013. (For persons dying in 2010, the executor can elect out of the estate tax by electing to accept certain carryover basis rules.)

²³For federal transfer-tax purposes, "executor" usually means the court-appointed personal representative for purposes of the decedent's probate estate, but the definition includes each person in possession of the decedent's assets, which means that the trustee of a decedent's revocable trust and recipients of other nonprobate transfers can be considered an executor for federal tax law.

²⁴The applicable exclusion for gift tax purposes was the same as that for estate tax purposes until 2004, when the applicable gift-tax exclusion for was frozen at \$1,000,000, which it remained until 2011 when the gift tax exclusion and estate tax exclusion were re-unified at \$5 million (subject to cost-of-living adjustments for 2012 and beyond). The applicable exclusion was adjusted to \$5.12 million in 2012 and \$5.25 million in 2013.

²⁵The "estate" for federal estate tax purposes includes the probate estate, plus most assets passing from the decedent by operation of law or contract, such as joint tenancy assets and life insurance. We can help you determine what assets are to be considered and whether or not an estate tax return is required.

²⁶The maximum rate imposed for federal estate tax purposes was, is, and will be: 50% in 2002; 49% in 2003; 48% in 2004; 47% in 2005; 46% in 2006; 45% in 2007, 2008, and 2009; 35% in 2010, 2011, and 2012; and 40% in 2013 and beyond.

²⁷The GST tax is imposed at the highest rate imposed for federal estate tax purposes, which is shown in note 26; however, a GST tax rate of zero (0%) applies for 2010. Starting in 2004, the GST exemption has been the same as the applicable exclusion for the estate tax, which is shown in note 22.



free. You can obtain many forms from the IRS web site on the Internet.²⁸ We strongly recommend that you have tax returns prepared by a Certified Public Accountant.

4.4 State Taxes: In Nevada, there is currently no income tax, gift tax, estate tax, or generation-skipping transfer tax on the state level. In the unlikely event that the federal government re-enacts the estate tax law to include a state death tax credit (not merely a deduction), Nevada will be entitled to a portion of the federal estate tax. Other states may have additional taxes that apply, depending on where the trustee is domiciled, where beneficiaries reside, and where assets are located. The rules are complicated, so be sure to consult with your accountant to determine if other states' taxes may be due.

4.5 Tax Payments: You should consult us or an accountant before paying any tax to make sure that you do not pay taxes owed by one person or group from funds belonging to another person or group.

5. ACCOUNTINGS AND DISTRIBUTIONS. You are required to account to the probate court for everything you receive and everything you disburse.

5.1 First Accounting; Claims. After the creditors' claim period has expired, you need to submit your first accounting. You also need to submit any claims approved by you to the judge for authorization to pay such claim. To simplify the procedure, we submit those claims as a part of the petition for approval of the first accounting.

5.2 Annual Accountings; Final Accounting. An annual accounting is required until the estate is closed, and the format is the same each year. Whenever the estate is ready to be closed, a final accounting is required.

5.3 Content of Accounting. You will have to provide an itemized record of all transactions. A formal accounting is filed with the court, which must contain a recapitulation that summarizes the accounting. The recapitulation shows all amounts for which you are responsible and then shows all amounts for which you can account. A recapitulation might look something like this:

(a) "Charges": The first part of a recapitulation is entitled "Charges", which reflects the amounts that the personal representative is "charged" to manage and account for:

CHARGES: AMOUNTS FOR WHICH THE PERSONAL REPRESENTATIVE IS RESPONSIBLE	
Description	Amount
Inventory or Prior Accounting	\$345,632.00
Receipts	\$23,453.23
Gains on Sales	\$0.00
Other Charges	\$0.00
TOTAL CHARGES	369,085.23

²⁸For IRS forms: <http://www.irs.gov/formspubs/index.html>. If you download the IRS forms in Adobe Acrobat format (.pdf files), the printed files will look just like the originals. The Adobe Acrobat reader program is required for this, but it is available free at <http://www.adobe.com/products/acrobat/readstep.html>.



- (b) “Credits”: The second part of a recapitulation shows the amounts that have been “credited” or accounted for:

CREDITS: AMOUNTS FOR WHICH THE PERSONAL REPRESENTATIVE CAN ACCOUNT	
Description	Amount
Disbursements	\$34,234.34
Losses on Sales	\$5,643.23
Other Credits	\$0.00
Assets on Hand	329,207.66
TOTAL CREDITS	369,085.23

- (c) Of course, the total amount for which you are responsible (“Total Charges”) and the total amount accounted for (“Total Credits”) should be identical. Cancelled checks and receipts are not attached to the accounting, but they must be made available if requested by the probate court.

5.4 Closing the Estate. The estate is ready to be closed when the assets are ready for distribution and all creditors' claims have been paid, successfully challenged, or barred by law.

- (a) If a creditor's claim is rejected by formal notice from you, the creditor has 60 days to file a lawsuit. A creditor's claim is barred (a) if it is not filed within the creditors' claim period or (b) if it is rejected and the creditor fails to file a lawsuit within the 60-day period following formal rejection. The IRS is not subject to the state creditors' claim laws, and the IRS's claims must be satisfied in accordance with federal law.
- (b) If the estate is ready for final distribution to the heirs or Will beneficiaries, we can request court to approve the distribution of the entire estate at the same time we ask the court to approve time of the first accounting; otherwise, we explain to the court why the estate is not yet ready to be closed. The estate cannot be closed if:
- (1) there is pending litigation involving the estate;
 - (2) assets need to be sold before distribution;
 - (3) money or other property that is due to the estate is still owing and uncollected;²⁹
 - (4) creditors' claims remain unsettled;
 - (5) there is a dispute among beneficiaries regarding the accounting or distribution; or
 - (6) tax liabilities or other legal obligations of the decedent or the decedent's estate have not been satisfied.

²⁹In some cases, one or more beneficiaries or creditors may be willing to accept a distribution of the estate's “receivable”.



5.5 Distributions. The ultimate goal of the probate process is to get the estate's assets distributed to those entitled to it.

- (a) You **MUST** get prior permission from the probate court before making any distribution to an heir or Will beneficiary. Failure to do so can put you in contempt of court, and the judge has authority to remove you from office and to reduce your compensation, or both. If you make a distribution to which a beneficiary is not entitled (perhaps because creditors have a higher priority), you may be held personally liable to the estate for any improper distributions to the extent they are not returned by the beneficiary.³⁰
- (b) If the decedent's spouse or minor children have basic needs that are not otherwise provided for, a claim for a "family allowance" can be made. Let us know if this situation applies.
- (c) In the absence of special circumstances, the probate court will not approve a distribution to a beneficiary or heir until (a) an inventory has been filed, together with all required appraisals; (b) the creditors' claim period has expired and creditors have been paid or funds have been set aside therefor; and (c) the executor or administrator has filed an accounting showing the current status of the estate. If the estate owes federal estate taxes, the probate court may require that the IRS be paid in full before a distribution to beneficiaries is made, even before the deadline for the payment of such taxes.
- (d) After each distribution, the distributees will be asked to sign receipts acknowledging receipt of the distribution which the court has approved for them. Receipts and disbursements made after the final accounting are shown on a supplemental accounting, which is provided to the probate court and the distributees. After the final distribution, when all distributees' receipts are filed with the court, the court will issue an order entitled "Final Discharge Order", which releases you from any further responsibility for the estate. At that point, the process of probate administration is completed.

5.6 Division and Distribution: The ultimate goal of the probate process is to get the estate's assets distributed into the hands of those entitled to them.

- (a) It is common for an estate to be divided into shares for various beneficiaries or groups of beneficiaries. Be sure to comply strictly with the requirements of the Will.
 - (1) Unless the Will provides otherwise, when the Will specifies that assets are to be divided into shares that are equal or based on a fraction or percentage, the allocation should be done on a "pro rata" basis, meaning that each beneficiary receives the specified fraction or percentage of each asset.
 - (2) A pro rata allocation is fair, but it is sometimes impractical, especially with hard-to-divide or hard-to-share assets, such as homes and cars. Most Wills and testamentary trusts permit the allocation of specific assets based on their values at a specified time. If you are going to pick and choose assets for various shares, you must make sure to take into consideration any apprecia-

³⁰If you misspend estate funds, you are not only breaching your fiduciary duty and subjecting yourself to civil liability, you may also be committing a crime, such as "conversion" or "embezzlement". In addition, debts arising from a breach of fiduciary duty may not be dischargeable in a bankruptcy proceeding.



tion or depreciation in assets between the time of valuation and the time of distribution or allocation to shares. For example, suppose that at the time of the testator's death there is a bank account with cash totaling \$100,000 and a home valued at \$100,000. After six months, you might be tempted to give the bank account to one beneficiary and the home to another beneficiary, but that would be unfair if the home had decreased in the meantime to be worth \$80,000 because of a downturn in the real estate market. You need to be fair and impartial about those things.

- (b) Even if a Will directs distributions "upon my death", no distribution to a beneficiary should be made from the probate estate until it is authorized by a court order. You will petition the court for an order authorizing distributions after you determine that there are sufficient assets to meet the estate's obligations to creditors, to the IRS, and to other beneficiaries. In some circumstances, the court will allow you to make a partial distribution.

5.7 Testamentary Trusts: A "testamentary trust" is created when a person's share is to be distributed upon a triggering event, in installments over a period of time, or in the discretion of the trustee.

- (a) If a testamentary trust is created, we recommend obtaining a tax identification number for the trust when assets are transferred to it, which usually occurs after the probate court issues an order that authorizes a distribution from the probate estate to the testamentary trust.
- (b) As trustee, you may make the distributions permitted under the trust portion of the Will without prior court authorization. If you have questions regarding the meaning of the Will's provisions and the distributions you are permitted or required to make, please contact us.
- (c) The probate court retains jurisdiction over testamentary trusts. Please check with us regarding your duty to prepare and provide accountings to beneficiaries. If minor beneficiaries are involved, we generally recommend obtaining court approval of all accountings to avoid problems after the beneficiaries become adults.

5.8 Anticipating Disputes: If you anticipate that some of your decisions may be challenged by beneficiaries, if you know that there will be some decisions that will favor one beneficiary (or group of beneficiaries) over another, or if some of the trust provisions are ambiguous requiring court interpretation, it may be wise to seek a court ruling, especially if you are about to make a decision that is controversial. This gives the beneficiaries an opportunity to express their concerns to the court, but once the court has made a decision, your compliance with the court order cannot be subsequently challenged.

6. CONCLUSION. The probate administration process will take your time and effort.

6.1 Time. It takes time to prepare petitions, inventories, and other court-required documents. There is a creditors' claim period that usually lasts 90 days (unless summary administration is allowed, in which case there is a 60-day creditors' claim period). Because of all this, it usually takes a *minimum* of six months to complete an uncontested estate. If federal estate taxes are owed to the IRS, the final distribution will not usually occur until at least 18 months after the decedent's death (or nine months after the estate tax return is filed, if longer). The sale of estate assets and disputes with beneficiaries, heirs, creditors, and other claimants can complicate matters and lengthen the time it takes to complete the probate process.



- 6.2 Effort.** From the day of your appointment until you are finally discharged, the primary responsibility for the estate rests on your shoulders. Our task is to help ease your burden in every way possible, so if you need help, please let us know.

[END: Version of January 13, 2011]

NOTE: This memo provides general information only and does not contain legal, accounting, or tax advice. For brevity, this memo is oversimplified and should not be relied on for any particular situation. Although this memo may discuss tax issues, this is not a "covered opinion" as defined in Circular 230 issued by the U. S. Treasury Department, and nothing in this memo can be relied upon to avoid any tax penalties.

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