

This document will provide the personal representative of an estate with information regarding the basic duties and potential liabilities one may face as a personal representative. It points out the most important of your responsibilities as personal representative, and also gives you some guidance as to how you can avoid a few of the potential problems that exist in the probate system.

DUTIES OF PERSONAL REPRESENTATIVE

In general, you have accepted four main duties as personal representative of an estate.

These duties are:

1. The duty of loyalty;
2. The duty to act prudently;
3. The duty to maintain accurate records and account to beneficiaries; and
4. The duty not to delegate responsibility.

Duty of Loyalty

The duty of loyalty is perhaps the most important of the duties you owe as an estate personal representative. Every action you take must be for the good of the beneficiaries of the estate. Avoid conflicts of interest; be careful not to place your interests over those of the beneficiaries you represent. You must not profit in any way from your administration of the estate. Additionally, you should maintain confidentiality regarding estate matters. Do not disclose information about the estate to others unless such disclosures are authorized.

Duty to Act Prudently

In representing the estate, you have a duty to exercise reasonable care, diligence, and prudence. This means that you must conduct yourself with the care and skill that an ordinary person would use in conducting his or her own affairs. The duty to act prudently involves two subsidiary duties: the duty to preserve estate assets, and the duty to use reasonable care and skill in investing. The duty to preserve and protect the assets of the estate includes the responsibility to provide adequate security for the estate assets. You may be held personally liable for loss occurring on uninsured or underinsured estate assets. Thus, we recommend that you have an insurance agent view the estate's assets, and that you have the estate purchase adequate insurance to protect against such loss.

You have a duty to use reasonable skill and care in protecting the estate's assets while making the property of the estate productive through investments. You must avoid undue risk. Do not invest in speculative ventures. It is your conduct, rather than the performance of investments, that determines your personal liability for loss due to investments. You are liable personally only for those losses resulting from imprudent action on your part.

Duty to Maintain Accurate Records and Account to Beneficiaries

Another important duty you have as an executor is to maintain accurate records. You may be held personally liable for a loss that results from failure to keep accurate records.

An excellent way of avoiding litigation while you act as personal representative for an estate is to keep the estate's beneficiaries informed.

Obviously, the more accurate and detailed your records, the easier such communication will be, and the less likely you are to incur liability for a breach of duty.

Duty Not to Delegate Responsibility

You have a fiduciary responsibility as an estate representative that you may not delegate to any person or entity. Though you may certainly employ attorneys, accountants, and others to assist you in representing, managing, and protecting the estate, you have a personal duty to perform the responsibilities of estate personal representative. You also have a duty to supervise those to whom you delegate ministerial tasks (those tasks that are administrative and do not involve major decision-making).

CONSEQUENCES OF BREACH OF DUTY

If you intentionally or negligently violate any duty you owe to the beneficiaries of an estate, you may be "surcharged," that is, held personally liable for any damages resulting from the violation of the duty. A beneficiary may sue you to recover damages for the breach. Typically, a successful beneficiary is awarded the amount he or she would have enjoyed had there been no breach. If a beneficiary can establish that you engaged in willful misconduct, punitive damages may be granted as well.

AVOIDING LITIGATION

There are several ways to avoid litigation regarding your estate administration. First and foremost, as discussed above, accurate record-keeping and communication with beneficiaries should accomplish much towards reducing the threat of litigation. The following suggestions are

included as added protection against suit:

Obtaining Receipts

You should get a receipt from beneficiaries for any estate assets you distribute to them. The receipt should describe the asset distributed, should indicate when and to whom the distribution was made, and should make it clear that the beneficiary accepted the asset. Our firm will be pleased to draft such a receipt for you.

Obtaining Consent

Should you decide to make a change in investments, it is a good idea to obtain the prior written consent of the beneficiaries. Obtaining prior written consent insulates you from loss as a result of the change in investment, providing the beneficiary has full knowledge of his or her legal rights and all relevant facts surrounding the investment decision before consenting. Of course, the beneficiary must be a competent adult, and must not be under any inducement to act.

Obtaining Release

A release is a written instrument discharging you from liability for past acts or omissions. Obtaining a release is an effective way of insulating yourself from liability in lieu of prior written consent. However, a release is ineffective unless the beneficiary has full knowledge of the relevant facts surrounding the past act or omission, and is not improperly induced to consent. I hope this letter has given you some idea of the duties and potential pitfalls of representing an estate during the probate process. Please do not hesitate to call me when you have more detailed questions regarding your role as a personal representative. Our law firm is ready to work with you to solve any problems that may arise in the future.