

## Ask the Probate Judge—Personal Representative's Priority

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**Q: My dad just died without a will. He has three daughters, including me, and one son who died leaving two adult children. You told me that before you can appoint me as personal representative, the other two daughters and the son's two children must give written consents to my appointment. Why do I have to get consents from the other two daughters and the two grandchildren? I am the oldest and always helped my dad after my mom died. C.H., Albuquerque**

This issue arises a lot at the probate court. If your dad had left a valid will, the court could appoint the person nominated in the will as personal representative without the written consent of anyone else. (Note to readers: this alone is an excellent reason to create a will.)

In an informal probate or proceeding, the probate or district court judge must appoint the personal representative who has the highest priority to serve. New Mexico's law lists those who have priority, starting with the highest:

- 1st person nominated as personal representative in the will (the alternate personal representative has priority if first-named personal representative declines to serve);
- 2nd surviving spouse who is a devisee named in the will;
- 3<sup>rd</sup> other devisees of decedent;
- 4th surviving spouse of decedent, when there is no will;
- 5th other heirs of decedent, when there is no will; and
- 6th any qualified person whose appointment is requested by an interested person, other than a spouse, devisee or heir (this is usually done via a formal proceeding).

If people want to proceed informally, written consents are required when someone who seeks appointment does not have the highest priority to serve as personal representative. The law states, "When two or more persons share a priority, those of them who do not renounce must concur in nominating another to act for them, or in applying for appointment."

New Mexico's rules governing the do-it-yourself probate forms contain instructions for obtaining consents and a place on the initial application for the signatures of those consenting to the applicant's appointment. These written consents have the effect of giving the person applying to be the personal representative the highest priority to serve.

In your example all five of you have equal priority to be appointed as personal representative because you are all "heirs" under the law. All five must consent in writing to one or more serving as personal representative. Alternatively, all five could agree in writing to the appointment of an unrelated individual or corporation as personal representative.

If you cannot agree on who will serve, the case must be filed as a formal appointment proceeding in the district court. In a formal proceeding, a personal

representative cannot be appointed until after notice and a hearing for all interested persons.

In large families when a person dies without a will and a court proceeding is necessary, sometimes twenty or more consents are required before a personal representative can be appointed. Imagine a decedent who had ten children, four of whom have died leaving five children each. Twenty-six consents would be required in this example.

An even bigger problem arises when someone who has equal priority for appointment cannot be found. In that case, if decedent's assets require a court's involvement, a formal appointment proceeding must be filed in the district court.

Once he or she is appointed by the court, a personal representative must give written notice of the appointment within ten days to the spouse, children (even if they are not included as beneficiaries of a will), devisees, if any, and heirs of the decedent.