

WHAT IS AN HEIR?

A personal representative is required to give notice to all heirs of a decedent's estate. The information that follows should assist personal representatives in identifying the heirs of an estate.

As defined by the New Mexico Probate Code, **heirs are persons "...including the surviving spouse and the state, who are entitled under the statutes of intestate succession to the property of the decedent"**. This means those people who would be entitled to inherit the decedent's estate if the decedent (deceased person) died without a valid Will (intestate).

This is important because New Mexico law requires that the heirs of an estate be listed in an Application for Appointment of Personal Representative, even if an heir is omitted from a Will or is specifically disinherited. The Personal Representative of the estate is also required to give the heirs notice of his/ her appointment within ten days of the appointment. This requirement gives the heirs an opportunity to challenge the Will or appointment of Personal Representative.

DETERMINING WHO IS AN HEIR

Generally, the heirs of the decedent are their surviving spouse and children, including all of decedent's biological children and adopted children.

If decedent is married, decedent's spouse is an heir.

If decedent has children, his or her children are heirs (if one or more of decedent's children has died, all children of the deceased child or children are also considered decedent's heirs).

If decedent has no spouse or children, decedent's parents are decedent's heirs, if both survive, or the surviving parent.

If decedent has no surviving spouse, children, or parents, then decedent's brothers and sisters are decedent's heirs; (if one or more of decedent's siblings has died, the children of the deceased sibling(s) are also heirs of the estate).

If decedent has no siblings, decedent's grandparents are decedent's heirs (if the grandparents are deceased, their children--decedent's aunts and uncles--are the heirs of the estate).

If no relatives of the decedent can be found, the estate "escheats" to the state school fund.

The names and complete addresses of the surviving spouse, children, heirs and devisees must be listed in the Application, along with the ages of any minor children. The heirs are determined according to the above criteria.

For example, if the decedent had no spouse, but had children, the Applicant lists the children (and children of any deceased children) and then stops. If the decedent had no spouse or children, then Applicant lists the parents, if any. If no parents, then the Applicant lists the next level of heirs, and so on. All devisees (people or entities named as beneficiaries in a Will) must also be listed, but not alternate devisees.

If you do not know who or where some of the heirs are, you have a duty to perform a reasonably diligent search for them. In New Mexico, any heir who fails to survive a decedent by 120 hours (5 days) is deemed to have died before the decedent.

OTHER POSSIBLE HEIRS?

Spouse from whom decedent is separated--Yes

Divorced spouse--No (but terms of the divorce decree may stipulate otherwise)

Fiancée or Significant other--No

Adopted child--Yes

Children adopted by others--No

Stepchildren and foster children--No

Biological children born outside of marriage--Yes

Children born after the death of a parent--Yes

You can leave these people (or anyone else) anything you want to in your Will. Under the terms of your Will you can also restrict what people will inherit from your estate.

A child may inherit from the estate of a parent who refused to support them, but a parent who has refused to support a child cannot inherit from the estate of that deceased child.

SHARE OF SPOUSE AND CHILDREN

Generally, unless a Will indicates otherwise, the surviving spouse receives all of the decedent's community property.

If a decedent had no children and no Will, the surviving spouse receives all of the decedent's separate property.

If the decedent had children and no Will, the decedent's children (or their heirs) receive 75% of the separate property, and the surviving spouse receives 25%. The terms of a Will can alter the distribution of a decedent's separate property.

The Personal Representative should be aware of family and personal property allowances, which are exempt from creditors and others with claims against the estate, and may apply even if a Will states other intentions.