

EXECUTOR'S LEGAL SURVIVAL® GUIDE

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This guide is designed to assist you in naming a good executor in your will; explain to executors their duties and responsibilities; and inform estate beneficiaries of the role of the executor in the probate process.

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I. EXECUTOR FAQs

Q What is probate?

A Probate is the process of proving that the will of a deceased person (testator) is in fact his or her will and reflects his or her wishes. The purpose of probate is to prove the validity of the will, have the executor appointed and administer the estate. A will may not be probated unless the Surrogate's Court is satisfied as to the genuineness of the will and the validity of the execution (signing) of the will. A will is not operative until it is admitted to probate by the Surrogate's Court. Admission to probate requires establishing, upon due notice to all required persons, that: (1) the will is the will of the decedent; (2) that it has been signed and witnessed and otherwise executed as required by law; (3) that at the time of its execution the decedent was of sound mind; and (4) that it, indeed, was the last will and testament of the decedent. The execution of a subsequent will revokes an earlier will. When the court is satisfied that the above conditions have been established, the will is admitted to probate and is effective for all purposes, including the transfer of the title to real property. Until such admission to probate, the will has no force and effect and the named executor has no authority.

Q What is a Small Estate?

A A Small Estate or Voluntary Administration is used when the decedent had less than \$50,000 of personal property and no real estate. If there is a possibility of a wrongful death or other lawsuit in the future, a probate or an administration proceeding should be filed. In a Small Estate proceeding, the Surrogate's Court appoints a Voluntary Administrator. If there is a will, the executor named in the will is appointed the Voluntary Administrator. If there is no will, the closest heir is named the Voluntary Administrator. The Surrogate's Court issues a certificate for each asset listed in the Affidavit of Voluntary Administration.

Q What qualities and abilities should an executor have?

A When you write a will as testator, it is especially important to choose competent and trustworthy executors and alternate executors. Otherwise, even careful estate planning may be rendered useless. The executor can be any person or institution that you choose. However, an executor should be:

- experienced and competent in business matters;
- familiar with your business, finances and property;
- able and willing to act as your executor;
- able to spend the time necessary to perform his or her duties;

- able to work with the estate’s attorney and accountant; and
- able to provide for the continuation of your business.

Q What are the executor’s responsibilities?

A A will names an executor who has the power to petition the Surrogate’s Court to probate a will. An executor is the “personal representative” and fiduciary of the decedent and as such must administer the estate. The executor must ensure that the will is carried out. In general, the executor must:

1. Handle funeral arrangements and pay for the funeral;
2. Pay any outstanding bills of the estate;
3. Collect and preserve assets;
4. Pay debts, taxes and administration expenses of the estate; and
5. Distribute estate assets according to the terms of the will.

Q Where is the will probated?

A A will is probated in the Surrogate’s Court of the county where the deceased lived at the time of death.

Q How much are filing fees?

A The Surrogate’s Court charges fees for probating a will according to the following statutory fee schedule which is based on the value of the probate estate:

<u>Value of the Estate</u>	<u>Fee Rate</u>
Less than \$10,000	\$ 45.00
\$10,000 but under \$20,000	\$ 75.00
\$20,000 but under \$50,000	\$ 215.00
\$50,000 but under \$100,000	\$ 280.00
\$100,000 but under \$250,000	\$ 420.00
\$250,000 but under \$500,000	\$ 625.00
\$500,000 and over	\$1,250.00

Q How much does the executor get paid?

A An executor is paid a commission for all sums of money and all property that he or she receives and pays out, including the estate assets (less any specific bequests or items of real or personal property left by the testator to a specific individual), and income plus all the reasonable and necessary expenses paid by him or her in order to probate the will based on this statutory rate schedule:

- 5% for receiving and paying out up to \$100,000.
- 4% for receiving and paying out the next \$200,000.

- 3% for receiving and paying out the next \$700,000.
- 2 ½% for receiving and paying out the next \$4,000,000.
- 2% for receiving and paying out sums above \$5,000,000.

However, the will may specify different provisions for paying the executor based on a previously agreed rate or fixed amount. It may be more advantageous for an executor who is also a beneficiary under the will to receive a disposition rather than an executor's fee. A disposition is not taxable, whereas executor fees are taxable as income. If the value of the probate estate is more than \$300,000, each executor up to a total of two is entitled to be paid a full commission. If more than two executors are named, they must split two full commissions unless the decedent has specifically provided otherwise in the will. Even though a testator can specify in the will that the executor must waive a commission in order to be eligible to serve, this is recommended only if the executor is a beneficiary or a very close personal friend, since being an executor is very time consuming. Banks and trust companies may charge more for their services as executors and trustees and particularly as money managers.

Q What are the steps in probating a will?

- A**
1. The executor must notify all individuals and guardians of children or incompetent persons who may benefit for the estate, and other parties.
 2. The court reviews the following documents:
 - a. Original will.
 - b. Petition for a decree of probate and appointment of an executor.
 - c. Death certificate.
 - d. Affidavits of attesting witnesses to the will signing.
 - e. Waivers from heirs.
 - f. Notices of Probate.
 - g. Sole Distributee Affidavit.
 3. The Court issues a decree for probate and letters testamentary which is the official decree of the Surrogate's Court giving authority and appointment to the executor to carry out his/her duties. Local court rules may require additional documents.

Q Should a family member be named as executor?

A Not necessarily. Usually each spouse names the other as executor and a child who lives nearby as the alternate executor. If the survivor is elderly, he or she may be unable to properly handle this important and technical task. If the estate administration is expected to be complicated or there is family disharmony, a bank trust department or attorney can be named as executor. The surviving spouse can receive reports from the corporate executor or attorney/executor and be kept advised of all the activities in the estate-settlement process without having to become involved with the details of carrying out the various tasks of estate settlement. Nonetheless, many clients still prefer to use family members as the executor of their estates.

Q What death or survivor benefits are available from Social Security?

A If the deceased has paid on Social Security for at least forty (40) quarters, death benefits and survivor benefits may be available. A death benefit of \$255 for funeral expenses is available to eligible spouses or dependent children. The survivor can complete the necessary forms at the local Social Security office or the funeral director may complete the application and apply the payment directly to the funeral bill. Survivor's benefits are available for a spouse age 60 or older; disabled surviving spouse age 50 or older; spouse under 60 who cares for dependent children under 16 or disabled children; and disabled children under the age of 18.

Q What Veterans benefits are available to the survivors?

A If the deceased was a veteran who received a discharge letter other than dishonorable, survivors may get \$300 for burial and funeral expenses and \$300 for a plot. There is a burial allowance of \$2,000 for Veterans who die of service-related causes. Burial in a national cemetery is free to veterans, spouse, and dependent children. Veterans are also eligible for a burial flag and headstone or grave marker. The surviving spouse and dependent children of disabled veterans may also be entitled to a lump sum death benefit, monthly payments, such as educational assistance and medical care.

Q What benefits are available from the decedent's employer?

A Many employers provide life, health, or accident insurance. The deceased may be due a final paycheck for vacation or sick leave. Contact all past employers to see if there are death benefits, continued health insurance coverage for the family, or payments from an annuity or pension plan. If the deceased belonged to a union or professional organization, check to see if death benefits are available for members.

Q What assets are considered to be non-probate assets?

A The following assets do not pass through probate or estate administration. Instead, the proceeds go directly to the person you named as beneficiary or joint owner of that account. Avoid probate with these forms of ownership:

- ✓ Life Insurance, unless all beneficiaries are deceased.
- ✓ Uniform Transfer to Minors (UTMA) accounts.
- ✓ U.S. Savings Bonds with payable on death beneficiaries or joint ownership.
- ✓ Investment accounts designated as Transfer on Death.
- ✓ IRAs and 401(k)s , unless the beneficiaries are deceased.
- ✓ Annuities.
- ✓ Joint Bank Accounts.
- ✓ Payable on Death and Transfer on Death bank accounts.
- ✓ Automobiles - One automobile, of up to \$25,000 in value, may be transferred at the DMV by a family member.
- ✓ Real Estate held as Joint Tenants with the Right of Survivorship, Tenants-by-the-Entirety or Life Estate.

Q Is the executor personally responsible for payment of the estate debts?

A The executor is personally responsible for payment of all debts and taxes to the extent of the estate's assets. Therefore, if the estate's assets are distributed to anyone other than the decedent's creditors and beneficiaries, the executor can be held personally liable. The executor should not distribute the assets to the beneficiaries until the will is probated because a later will could be located, a surviving spouse could exercise his or her right of election or an objection to probate could be made.

Q Is the executor required to file a bond?

A Generally, an executor is no longer required to file a bond with the court unless the will requires it. If required, a bond is purchased by the executor from a bond company. The executor pays for the bond with assets from the estate. The bond secures the amount of the value of the estate which protects the beneficiaries if the executor steals the estate's assets. Unless the will specifically provides otherwise, an executor will be required to file a bond if he or she is not a resident of New York State, is not sufficiently responsible, or is required to hold, manage or invest real or personal property for the benefit of another person.

Q Who can be an executor?

A Any U.S. citizen over the age of eighteen (18) years who has not been convicted of a felony can be named executor of a will. Some people choose a lawyer, accountant or financial consultant because of his or her expertise. Others appoint a spouse, adult child, relative or friend, especially if the estate is small. Because of the many responsibilities involved, it is prudent to ask the named executor if he or she is willing to serve as executor.

Q What should the executor do if the decedent was a tenant with a lease?

A If the decedent was a tenant with a lease, the executor is required to find another tenant for the remainder of the lease term. The executor should request that the landlord consent to assignment of the lease or to the subletting of the premises. The request must be accompanied by a written consent of any co-tenant or guarantor of the lease and state the name, business and home address of the proposed assignee or sub-lessee. Within ten (10) days after the mailing of the request, the landlord may ask the executor for additional information.

Q Will the executor have to pay federal and state estate taxes?

A New York State estate taxes will only have to be paid if the gross estate (probate and non-probate assets) exceeds \$ 5,740,000. Federal estate taxes will have to be paid only if the gross estate exceeds \$11,580,000.

II. EXECUTOR'S CHECKLIST

A. Make burial and funeral arrangements.

1. Check the will/health care proxy or burial designation form for directions regarding funeral arrangements and organ donation.
2. Meet with the funeral director, cemetery representative and clergy to make burial and funeral arrangements.

B. What Documents and Information to Collect. Collect the following documents in order to establish insurance, pension, social security and ownership rights:

1. Will and Affidavits of Witnesses
2. Birth Certificate
3. Marriage Certificate from the County Clerk
4. Death Certificate from the funeral director or city or town clerk
5. Social Security records
6. Citizenship/Immigration/Naturalization papers
7. Insurance policies (life, health, credit, accident & property)
8. Bank books and statements to determine name of bank, account numbers, balance and names on account
9. Deeds
10. Leases and tenant information
11. Car title and registration – license number and vehicle identification number
12. Income tax returns (IRS Form 4506)
13. Veterans Discharge Certificates
14. Disability and Workers' Compensation claims
15. Property tax bills and receipts
16. Credit card information
17. Trusts
18. Names and Addresses of relatives and beneficiaries
19. Title search
20. Property Survey
21. Stocks – broker name, company name, number of shares and date of death value
22. Bonds – serial number, issue date and date of death value
23. Employment death benefits
24. Separation agreements, prenuptial agreements and divorce decrees
25. IRS form 712 from each life insurance company
26. Spouse's Death Certificate
27. Pension/IRA statements
28. Promissory Notes and Mortgages

C. Who to notify:

1. Creditors (e.g. credit card companies, mortgage company)
2. Banks/Credit Unions
3. Stockbrokers/Financial Planners
4. Church or synagogue
5. Post office
6. Relatives
7. Employer
8. Insurance agents: life, annuity, auto, health and disability
9. Religious, fraternal, civic, veterans, professional and alumni organizations
10. Unions
11. Newspapers regarding death notices
12. Attorney
13. Accountant
14. Beneficiaries
15. Social Security Administration
16. Veterans Administration
17. IRS Form 56: Notice Concerning Fiduciary Relationship
18. Landlord
19. Trustees
20. Defense Finance and Accounting Service, 800-269-5170 (military service retiree receiving benefits)
21. Office of Personnel Management, 888-767-6738 (if decedent is a retired or former federal civil service employee)
22. U.S. Citizenship and Immigration Service (if decedent was not a U.S. citizen)
23. State Department of Motor Vehicles (if decedent had a driver's license or state ID)

D. Preserve Estate Property

1. As a precautionary measure, have a witness present when you handle estate property.
2. Order an appraisal of the personal and real property of the estate.
3. Change locks on residence.
4. Cancel credit cards.
5. Arrange for security at decedent's place of business.
6. Install an alarm system or change the existing alarm system codes, or hire security service if warranted by value of assets.
7. Notify police if the house is vacant.
8. Take photographs of the house, rooms, jewelry, etc., to document contents.
9. Advise anyone who has power of attorney that the power has terminated and that they are no longer authorized to act.
10. Advise family members and beneficiaries not to take tangible personal property from the decedent's residence and not to open any safe deposit boxes.

E. Notify Credit Reporting Agencies. Notify all three of the following national reporting agencies of the death and instruct them to list all accounts as “Closed. Account Holder is Deceased.” Request a credit report in order to obtain a list of all creditors and to review recent credit activities.

1. Experian, 888-397-3742, P.O. Box 9701, Allen, Texas 75013
2. Equifax, 800-525-6285, P.O. Box 105069, Atlanta, Georgia 30348
3. TransUnion, 800-680-7289, P.O. Box 6790, Fullerton, California 92834

F. What Advisors to Hire:

1. Retain a local attorney for probate and an out-of-state attorney for ancillary probate. The attorney will determine whether there is a need for preliminary letters or letters of temporary administration.
2. Real estate and personal property appraisers.
3. Real estate broker to sell the house or sublet the apartment.
4. Investment advisors.
5. Certified Public Accountant to prepare the estate, individual and fiduciary returns and to check with the IRS and state tax authorities for back taxes or unfiled returns.
6. Insurance agent for the executor’s bonds and to obtain proper coverage.

G. What has to be paid:

1. All valid debts including funeral costs.
2. Fees and expenses incurred in administration.
3. Estate taxes.
4. Income and other taxes.
5. Medical bills.
6. Utilities.

H. What Benefits to Apply for:

1. Social Security.
2. Insurance.
3. Veterans Administration.
4. Obtain employer identification number by completing IRS Form SS-4.

I. What Records to Maintain:

1. Assets
2. Income
3. Disbursements
4. Open estate checking, savings and/or investment accounts

J. File an Inventory of Assets with the Surrogate's Court within six (6) months of your appointment. The inventory consists of the following:

1. Cash and cash equivalents.
2. Insurance proceeds.
3. Death benefits payable to the estate.
4. Tax refunds.
5. Medical insurance payments due to the decedent.
6. Real estate.
7. Stocks and bonds.
8. Business interests.

K. Estimate the Estate's Cash Needs

1. Funeral expenses.
2. Cash legacies.
3. Filing fees.
4. Accounting and legal fees.
5. Estimated commissions and guardian ad litem expenses.
6. Payment of decedent's debts.
7. Cost of safeguarding and maintaining assets.
8. Cost of selling assets.
9. Estimated gift, income and estate taxes.

L. Verify Insurance Coverage

If a decedent owned real estate or an automobile or other tangible personal property at the time of death, it is extremely important that the executor address insurance coverages when administering the estate. Insurance is provided pursuant to the terms of a contract between the insurance company and the insured. Therefore, the executor should review the terms of the insurance contracts. At a minimum, the executor should speak with the insurance company to notify it of the death of the insured and to determine whether coverage continues after the death of the insured. In all cases, premiums should be paid timely.

Where the decedent owned real estate in his or her name alone, the coverage may cease upon the death of the decedent or a reasonable period thereafter. In some cases, the insurance company will continue coverage provided the premiums are paid timely. Unfortunately, there is no standard in the industry. This is why the executor should notify the insurance company of the death as soon as possible and take steps to either continue coverage or obtain new coverage. The executor should take detailed notes of all conversations with the insurance company to document who they speak with and what was said.

Most policies contain provisions that reduce or eliminate insurance coverage if the real estate remains vacant (i.e. unoccupied and without contents) for a period of time. Therefore, it is not in the best interests of the beneficiaries of the estate to avoid full disclosure to the insurance company. Insurance companies do not like to pay claims and in the event of a loss will look for a defense so

that it does not have to pay. If the real estate is going to be vacant, this should be specifically disclosed to the insurance company. In such cases, coverage can usually be purchased for a higher premium.

As soon as possible in the estate administration, the executor should inventory tangible personal property. When speaking with the insurance company, the executor should determine what coverage is in place for the contents of the real estate and how to continue it. In many cases, contents are covered under the homeowner's policy up to a certain dollar amount. If the estate consists of tangible personal property in excess of the dollar amount (i.e. jewelry or art), the executor should consider purchasing additional coverage. If the executor is going to take possession of these valuables for safekeeping, he or she needs to discuss the location of the tangible personal property with the insurance company to confirm that coverage continues if the tangible personal property is moved to another location.

As a general rule, after the death of the insured, automobile insurance coverage will continue for a surviving spouse who was a resident of the same household as the deceased insured and for a relative who was insured at the time of the insured's death. In addition, the decedent's executor will be insured but only while acting within the scope of such executor's duties (i.e. transporting the car for sale, inspection, etc.). While many automobile insurance policies cover anyone to whom the owner gives permission to drive the automobile, when the owner is dead, he or she cannot give permission. Therefore, the executor should assume that no other drivers are covered and should not let anyone else drive the automobile.

Finally, if there is a loss related to any property, real or personal, the executor should notify the insurance company immediately.

M. Distribute money and property in accordance with the will and make the final settlement at least seven (7) months after being appointed as executor.

1. Ascertain if any assignments are on file, pay legacies, and deliver specific bequests according to the will.
2. Obtain releases from beneficiaries and discharge from the court.
3. In distributing assets from the residuary estate, choose a date that will result in income tax economy for the beneficiaries as well as for the estate.
4. Prepare information for final accounting, including all assets, income and disbursements.
5. Set-up trusts created by the will and arrange for payment of any regular remittances to trust beneficiaries.

III. WEB RESOURCES

- A. For further information and forms visit WNY-Lawyers.com.
- B. For state-specific information on how to obtain birth, death, marriage and divorce records, visit www.cdc.gov/nchs/howto/w2w/w2welcome.htm.
- C. Regulations of the Federal Trade Commission on funeral homes can be found at <http://www.ftc.gov/bcp/edu/microsites/funerals/>.
- D. Social Security benefits are explained at www.ssa.gov/pubs/10084.html.
- E. Information about Veterans burial benefits, military funeral honors, burial flags and survivors' benefits can be found on the VA site at https://www.va.gov/opa/publications/benefits_book/benefits_chap08.asp.
- F. IRS information on the steps needed to file final tax returns for decedents can be found at irs.gov.

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